Supreme Court, U.S.
FILED

No. 03 366 SEP 8 - 2003

In The
Supreme Court of the United States

NEW ORLEANS STEVEDORES AND
SIGNAL MUTUAL ADMINISTRATION LTD.,

Petitioners,

v.

PEGGY IBOS, Surviving Spouse of Bertrand Ibos, Jr.,
and DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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109 pp

QUESTION PRESENTED

In the decision below, the court of appeals held an employer liable for the payment of benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901-951 ("LHWCA" or "Act") where the employer proved by uncontradicted scientific evidence that it was not in any way responsible for causing, aggravating or otherwise affecting the employee's disability or death due to asbestos related mesothelioma. The question presented is:

Whether section 2(2) of the LHWCA, 33 U.S.C. § 902(2), authorizes the imposition of liability for benefits on an employer that proves it had no role in causing an employee's occupational disease.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioner New Orleans Stevedores is an independent corporation. Petitioner Signal Mutual Administration Ltd. is a not-for-profit group self-insurance facility. Peggy Ibos is a claimant for benefits under the LHWCA on her own behalf and as surviving spouse of Bertrand Ibos, Jr. The Director, Office of Workers' Compensation Programs, is the administrator of the LHWCA compensation program.

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PETITION FOR A WRIT OF CERTIORARI

New Orleans Stevedores and Signal Mutual Administration Ltd. respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 317 F.3d 480. Appendix ("App.") 1. The order of the court of appeals denying petitioners' petition for rehearing en banc is unreported. App. 75.

The decision of the administrative law judge ("ALJ") dated April 13, 2000 is unreported. App. 31.

The decision of the Benefits Review Board dated May 2, 2001 is reported at 35 Ben. Rev. Bd. Serv. 50. App. 18.

JURISDICTION

The opinion and order of the Fifth Circuit was entered on January 16, 2003. App. 1. A final judgment of the Fifth Circuit was entered on June 10, 2003, denying rehearing and rehearing en banc. App. 75. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Section 2(2) of the LHWCA, 33 U.S.C. § 902(2) provides:

§ 902. Definitions

When used in this chapter –

(2) The term "injury" means accidental injury or death arising out of and in the course of employment and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

Section 3(a) of the LHWCA, 33 U.S.C. § 903(a), provides:

§ 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

Section 4 of the LHWCA, 33 U.S.C. § 904, provides:

§ 904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor

> fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.
>
> (b) Compensation shall be payable irrespective of fault as a cause for the injury.

STATEMENT OF THE CASE

Introduction

In 1955, the Second Circuit adopted a rule imposing LHWCA liability for a covered injury resulting from the cumulative effects of exposure to injurious stimuli on the employer "during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment. . . . " *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 145 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955) (the "*Cardillo* rule"). The Court found two compelling reasons supported the rule – first, it is "administratively feasible" and second,

> the dearth of medical certainty with respect to the time that is required for them to develop and the permanence and extent of the resultant injurious effects at different stages of the diseases' evolution, make it exceedingly difficult, if not practically impossible, to correlate the progression of

> the disease with specific points in time or specific industrial experiences.

Id. at 144.

The court of appeals found the statute to be silent on the question and pointed to Congress' rejection of a proposal to apportion liability among jointly responsible employers as supportive legislative guidance. *Id.* at 145. Neither did any of the employers in *Cardillo*[1] prove that their employment did not contribute in some way to the hearing loss upon which the *Cardillo* claims were predicated.

Over the forty-eight years since *Cardillo*, the rule has proven to be a fair and reasonably efficient method for allocating liability for injuries or diseases caused by cumulative exposures over successive periods of employment.

The decision below goes one step beyond this rational approach to the allocation of liability for occupational disease claims. The court of appeals here endorsed a rule assigning liability when there is no causation – where the employer proved it had no role whatsoever in causing the cancer that disabled and killed Bertrand Ibos, Jr. The decision is not supported by the rationale of the *Cardillo* rule and suggests a liability scheme in which responsibility of any kind is simply irrelevant and no factual connection between employment, disease and liability is required. The court of appeals erred in its failure to

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[1] *Cardillo* consolidated three claims for benefits on account of occupationally related hearing loss.

recognize that Congress drew a line in section 2(2) of the Act to preclude this transition of a good rule into an arbitrary rule that eliminates the rational connection that Congress expected between liability and responsibility.

The Ibos' Claim

Bertrand Ibos, Jr. began working in the longshore industry in 1947, and in the early years, before 1979, he experienced substantial and frequent contact with cargo and ships presenting a substantial risk of exposure to airborne asbestos fibers. These exposures decreased over the years. In the Fall of 1993, he went to work for New Orleans Stevedores ("NOS"). He had been healthy all his life and suffered no chronic illness. He was not diagnosed with any asbestos-related disease. By 1993, the hazards of asbestos exposure were well known and great pains were taken to abate any known asbestos hazard and avoid unprotected contact with asbestos products.

In December 1993, Ibos was exposed to asbestos for about one-half hour during the unloading of the MV LaPaix. NOS was warned that the LaPaix cargo contained asbestos products before the vessel reached port and made it known that the company would not enter the hatch, would not open the container after the cargo was containerized and would not handle the cargo. The port captain was instructed to remove the container and its cargo from the NOS terminal. Ibos was not personally aware of any other asbestos exposure while working for NOS, although later he claimed several off-site exposures, most of which the ALJ refused to credit as too speculative. App. 63-64. The NOS workplace was asbestos-free as far as the record shows.

On August 13, 1995, Ibos was diagnosed with mesothelioma, an often terminal cancer of the lining of the lung known to be caused by asbestos exposure. *See Norfolk & Western R. Co. v. Ayers*, 123 S. Ct. 1210, 1215 (2003). On February 14, 1996, Ibos died due to the disease.

Ibos filed a claim for benefits under the Act and after his death, his survivor, Peggy Ibos continued to pursue his claim and filed her own claim for survivor's benefits. The case was sent to an ALJ for adjudication and medical evidence was developed. NOS contested, among other things, that it had any role in causing Ibos' illness and argued that it should not be held liable for it. The medical evidence supported NOS's denial of responsibility.

All of the physicians who addressed the matter agreed that Ibos' exposure at NOS did not cause, contribute to, aggravate or hasten the progression of Ibos' mesothelioma. They all agreed that the disease has a long latency period, that it began at the cellular level, well before Ibos began work at NOS and that any additional exposure to asbestos experienced by Ibos at NOS, however large or small, had no impact whatever on the course of the disease. As a matter of fact, the causal link between Ibos' disability and death and his employment by NOS is conclusively severed by uncontradicted medical evidence.

Dr. Howard Sandler testified that mesothelioma has a latency period of twenty to forty years or more. *Id.* at 49. He testified further:

> Q. Now you stated in your report . . . four to eight years is what you believe the tumor would have been present before it was diagnosed in 1995?
>
> A. Yes.

* * *

Q. After the latency period, continued exposure produces a symptomatic situation, if not a causative situation?

A. No. Once you have the cancer it goes about its own merry way based on the nature of the cancer itself, the cell times, et cetera. You can breath [sic] as much asbestos as you want, once you have mesothelioma it is not going to change the course of the disease.

There is no serious disagreement in the record over any of these conclusions. Dr. Salvatore Caputto, who claimed no expertise in asbestos disease, was unsure whether Ibos' recent exposures would have "played any part in his disease," but thought it would be unusual. Dr. Caputto believed that the more recent exposures might create a new risk or "the risk of inducing some more symptoms because of the effects of dust on the lung function . . . somewhat independent of the cancer per se." No such effect is shown in the record.

Dr. Pamela Martin, the treating oncologist, agreed that additional exposure after the disease process begins would not have materially changed the process or changed the patient's symptoms. She testified that "additional insults, although they are occurring don't really change the course of the disease." She agreed that Mr. Ibos' disease process began many years earlier.

Mr. Alan Jurisich, an industrial hygienist, testified that Ibos' exposures at NOS did not accelerate or have "anything to do with the acceleration or cause of his mesothelioma."

On April 13, 2000, the ALJ issued a decision and order awarding benefits, including temporary total disability benefits, on account of Mr. Ibos' disability due to mesothelioma from October 11, 1995, until the date of his death on February 14, 1996, and survivor's benefits in accordance with 33 U.S.C. § 909 on account of Mr. Ibos' death due to mesothelioma from February 15, 1996, and continuing. In holding NOS liable for the benefits awarded, the ALJ applied an irrebuttable last exposure presumption of liability while searching for other theories of liability as well. App. 69-70.[2] Although somewhat obscured by the ALJ's words, it is clear that the award is premised on the theory that liability in no way is contingent upon actual medical causation. App. 68.

NOS appealed to the Benefits Review Board in accordance with 33 U.S.C. § 921(b). Ibos cross-appealed to challenge the ALJ's application of the "credit doctrine" to offset NOS's liability by the amount of settlements obtained from prior employers.[3] In support of its appeal,

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[2] The ALJ's analysis is somewhat befuddled and it betrays his own obvious discomfort with the liability question. At one point, he found NOS liable for having caused "cellular level" injury independent of the cancer even though no such injury is compensable under the LHWCA. App. 66. Neither the Board nor the court of appeals addressed this alternative theory of liability but it is, in any case, untenable.

[3] From 1979 to 1993, Ibos was an owner or part owner of Valor and Anchor Stevedores. The insurers for both companies agreed to settle Ibos' unasserted claims against them on account of asbestos exposures with Valor and Anchor. The settlement agreements are fairly ambiguous in describing the claims being settled and, most likely, were drafted to avoid the consequences of 33 U.S.C. § 933(g). The Board affirmed the credit but the court of appeals reversed with Judge Jones dissenting. App. 1, 18. This Court is not asked to review the disposition of this

(Continued on following page)

NOS argued principally that the ALJ's elimination of true medical causation was based entirely on dictum in cases where medical causation could not be disproved by the employer. In those cases, the employer thus failed to rebut the presumption of causation in 33 U.S.C. § 920(a) and was assigned liability for that reason, not because true medical causation was irrelevant to the employer's liability. By taking the next step in making true causation irrelevant, and the causation presumption irrebuttable, the ALJ's approach here created an irreconcilable tension with section 2(2) of the Act. 33 U.S.C. § 902(2).

On May 9, 2001, the Board issued its decision and order affirming the liability of NOS for benefits due in this claim. The Board's opinion launches directly into a survey of cases defining the "last employer" and "last exposure" rules and applying these rules in cases involving long latency illnesses like mesothelioma, coming ultimately to rest on the theory that the liability principle embodied in the last exposure rule is absolute unless the last employer proves that "the asbestos exposure experienced by decedent [Ibos] at NOS did not have the potential to give rise to mesothelioma." App. 28.[4]

The Board does not address the troubling statutory language in section 2(2) of the Act, seeming to demand a higher level of culpability as a predicate to liability and neither does the Board explain whether the "potential" to

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issue. It is not, however, irrelevant to the question on which review is requested. *See* App. 17 (Judge Jones, dissenting).

[4] The court of appeals held that this legal standard was not correct, but that the error was harmless. App. 8.

give rise to mesothelioma means the potential to give rise to the disease suffered by Ibos, or the potential to give rise to another round of the disease in the future.

NOS appealed to the Fifth Circuit and again pressed the argument that the language of the Act does not accommodate strict liability notwithstanding the absence of some contributing causation, however small it may be. Neither the *Cardillo* rule nor its rationale support strict liability and it is extraordinarily improbable that a Congress sitting in 1926, would burden innocent employers with such serendipitous and random liability. The Department of Labor participated at the court of appeals, seeking judicial deference for a strict liability theory.

On January 16, 2003, the court of appeals affirmed NOS's liability, holding:

> First, we disagree with NOS's and Signal's premise that, for purposes of liability, § 2(2) of the LHWCA requires a true causal link between Decedent's exposure while working for NOS and the development of Decedent's mesothelioma. Under § 2(2), there are two prongs to the statutory definition of a compensable "injury": "[1] accidental injury arising out of and in the course of employment, *and* [2] such occupational disease or infection [a] *as arises naturally out of such employment* or [b] as naturally or unavoidably results from such accidental injury[.]" LHWCA § 2(2), 33 U.S.C. § 902(2) (emphasis added). The Director interprets the "arises naturally out of" language of § 2(2) to require only that the conditions of the employment be *of a kind* that produces the occupational disease. This interpretation is consistent with congressional intent, as it was first interpreted by the Second Circuit in *Travelers Ins.*

> *Co. v. Cardillo*, 225 F.2d 137 (Cir. 1995). In *Cardillo*, the Second Circuit found, as a matter of legislative interpretation, that Congress intended full liability to rest on the last exposing employer, regardless of the absence of actual causal contribution by the final exposure. *Cardillo*, 225 F.2d at 145.

App. 6.

The court of appeals relied also on Congress' rejection of a liability apportionment proposal in 1926, in reaching its holding and rejected NOS's complaint that the absolute last exposure rule created an impermissible irrebuttable presumption of an innocent employer's liability. The court of appeals held that the test for rebuttal of the last employer presumption is not medical causation, but 1) whether exposure to asbestos did not cause Ibos' mesothelioma or 2) the last exposure to asbestos occurred in some subsequent LHWCA-covered employment. App. 8-9.

Judge Jones dissented from the majority's interpretation of the credit doctrine but in her opinion observed:

> Moreover, the credit doctrine operates here to ameliorate the dramatic consequences of another *judicially created* rule. The majority purports to defend the last employer rule as if it had been approved by Congress, but this court has characterized it as "a *judicially created rule* for allocating liability among employers in cases where an occupational disease develops after prolonged exposure." *Avondale Indus., Inc. [v. Director, OWCP]*, 977 F.2d [186] at 190 [(5th Cir. 1992)] (emphasis added) (quotation omitted).
>
> If these issues were questions of first impression, we might look at no more than the

> statutory language of the LHWCA and might conclude that there is no justification for the last employer rule or the credit doctrine. Given the wealth of precedent, however, we are not free to roam. We are justifiably bound by a fifty-year old last employer rule, a thirty-year old credit doctrine, a fifteen-year old en banc decision of this court (*Nash*) and ten-year old interpretations of the foregoing (*Avondale Indus.* and *Aples* [*ITO Corp. v. Director, OWCP*, 883 F.2d 422 (5th Cir. 1989)]. Only by picking and choosing among the authorities does the majority reach the patently inequitable result in this case.

App. 17.

A petition for rehearing and rehearing en banc was denied by the court of appeals on June 10, 2003, Judge Edith H. Jones dissenting. App. 75.

REASONS FOR GRANTING THE PETITION

I. The Imposition of Strict Liability Without Medical Causation Goes Beyond and Conflicts With Current Law

The significance of the court of appeals decision and the point of reference that sets it apart from prior last employer jurisprudence is that, when faced with absolute proof severing causation from employment, the court is trapped in the casual and unintended despotism of the *Cardillo* rule. The *Cardillo* rule is a valid, logical rule that simply does not address the circumstances presented here. Under *Cardillo*, an injury or disease that is the sum of repeated injurious exposures, including exposure with the most recent employer, is the product of all of the exposures

and assigning liability to the employer at the time of the last injurious exposure is a rational cost-spreading rule. *See Cordero v. Triple A Mach. Shop*, 580 F.2d 1331, 1336-37 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979) (liability should fall on the employer "covering the risk at the time of the most recent injury that bears a casual [sic] relation to the disability."). Liability falls on the last employer no matter how small the contribution. The question presented by the decision below is not whether a small contribution is a sufficient basis on which to predicate liability. That question was settled correctly by *Cardillo*. The question presented here is whether liability properly is assigned where it is proved that there is no contribution and no rational connection between the worker's disease and employment with the employer. *Cardillo* does not directly address this question.

The inter-circuit disagreement on this question does not arise in cases like *Cordero* and *Cardillo*, but when it is clear that the causal link can be and is broken by proof that the employer is entirely innocent notwithstanding some or no injurious exposure. In these cases, there is no rational basis for requiring the innocent employer to be the insurer of last resort for those more culpable. The logic of *Cardillo* simply is lost in this setting.

The Ninth Circuit has struggled with the *Cardillo* conundrum more than most and is not, like the court below, willing to impose liability on innocent employers if the proof establishes an absence of a sufficient link between the employment and disease. In *Todd Pac. Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 1320 (9th Cir. 1990) ("*Picinich*"), the last employer abated any asbestos hazards at its workplace and even though there may have been minimal exposure, the Ninth Circuit observed

"Lockheed [the second last employer] directs us to no evidence in the record and we have found none which indicates that such an exposure should have occurred 'in sufficient quantities to cause [Picinich's] disease.'" *Id. quoting Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1286 (9th Cir. 1983). The court thus held the second last employer responsible for the claimant's asbestos-related disease, finding that the last exposure did not expose the claimant to "the injurious stimuli in sufficient quantities to cause the disease." *Id.* at 1330.

The Ninth Circuit's approach plainly requires a connection between the exposure and the disability and construes the "injurious stimuli" prong of the *Cardillo* formula to mean that a causal connection is relevant to the liability determination; that is, that the stimuli actively caused or contributed to the injury. The Ninth Circuit, at least, allows the employer to prove that the connection, notwithstanding exposure, is insignificant and thus not a proper basis for imposing liability. *See Cordero*, 580 F.2d at 1337 ("we held Triple A responsible for the entire disability because 'there [was] a rational connection between the length of employment proven and the contribution to the development and aggravation of the disease.'" [additional authority omitted]); *Ramey v. Stevedores Serv. of Am.*, 134 F.3d 954, 959 (9th Cir. 1998) (when an injury develops over the course of a longshore worker's career, "liability rest[s] on the employer covering the risk at the time of the most recent injurious exposure *related* to the disability." [emphasis is original]). *Cf. Lustig v. Director, OWCP*, 881 F.2d 593, 596 (9th Cir. 1989) (rejecting an unproved latency defense).

In *Port of Portland v. Director, OWCP*, 932 F.2d 836, 840-41 (9th Cir. 1991) ("*Ronne*"), the Ninth Circuit acknowledged that the *Cordero* rule "does not require a

demonstrated medical causal relationship between claimant's exposure and his occupational disease," but held that there must be a "rational connection" between liability and the injury. The Court stated: "We reject any reading of *Cardillo* that would impose liability on an employer who *could not*, even theoretically, have contributed to the causation of the disability. Our emphasis on rational connection and causal relation in *Cordero* militates against such a reading. *See Cordero*, 580 F.2d at 1336, 1337 (emphasis in original)." *Id.*

In Ibos' case it was proved to a medical certainty that his trivial exposure with NOS could not even theoretically have contributed to his disability and death due to mesothelioma. The rational connection demanded by the Ninth Circuit is not a feature of the Fifth Circuit's rule. While the Ninth Circuit's rational connection approach ensures fairness to innocent employers, the Fifth Circuit's strict liability formulation does not.

Neither have other circuits embraced the notion that *Cardillo* is a last employer trap, whatever the medical truth may be. While all courts restate the seemingly mandatory *Cardillo* rhetoric, their holdings reveal openness to proof severing the link between the disease suffered by the claimant and the exposure in the course of employment. In rejecting a latency defense, the Fourth Circuit recently distinguished *Ronne* from the case before it, noting that the "factual impossibility for the claimant's employment with the employer to have contributed in any way to his hearing loss" contrasted significantly with "[t]he evidence in this case [which] fails to support the inference that due to the prolonged latency period of mesothelioma it was factually impossible for [the claimant] to have sustained injury by his exposure [with the

employer]." *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 387 (4th Cir. 2000). The court also rejected an invitation to apply the Ninth Circuit's *Picinich* rule finding the case factually distinguishable. The employer in *Faulk* alleged, but did not convincingly prove, that the worker's eighteen years of employment had no effect on the employee's latent disease. Nevertheless, the Fourth Circuit's opinion does not foreclose the possibility that the court would follow *Picinich* or *Ronne* in an appropriate case.

The First Circuit also has suggested the rebuttability of the *Cardillo* rule "by showing that exposure to injurious stimuli did not cause the harm." *Bath Iron Works v. Brown*, 194 F.3d 1, 5 (1st Cir. 1999); *see also Bath Iron Works v. Director, OWCP*, 224 F.3d 227 (1st Cir. 2001). *See also America Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 65 (2d Cir. 2001) ("[t]he burden shifts to the employer to rebut the presumption with substantial evidence that the alleged harmful workplace exposure did not cause, contribute to or aggravate the claimant's condition.").

The decision of the court below travels beyond existing precedent and creates a new liability regime where a rational connection[5] between liability and responsibility is

[5] The absence of a rational connection suggests a constitutional dimension to the issue presented and the issue was suggested as a concern in briefing below. In the absence of valid congressional findings or some very compelling reason, a rule of absolute liability that prohibits any genuine factual inquiry may lack sufficient rationality to pass constitutional muster. *See e.g., Eastern Enter. v. Apfel*, 524 U.S. 495, 528-35 (1998); *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 n.32 (1987) (this Court identified a constitutional concern where probative evidence tending to disprove presumed causation may not be

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simply irrelevant. This Court has taken responsibility for assuring rationality and uniformity of our national admiralty laws and should do so here.

II. The Decision Below Is Not Compatible With The Act

A somewhat remarkable feature of the *Cardillo* opinion is its observation that the LHWCA is silent on the identification of the liable employer. *Cardillo*, 225 F.2d at 144. It is even more remarkable that this perception of silence has prevailed until the court below confronted the statute in this case.[6] To the contrary, section 2(2) of the Act, 33 U.S.C. § 902(2), in conjunction with sections 3(a) and 4, 33 U.S.C. § 903(a), 904, provide direct guidance for identifying a responsible party for both injury and occupational disease claims. Section 2(2) provides:

> The term "injury" means accidental injury or death arising out of and in the course of employment and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. . . .

Sections 3(a) and 4, in turn, obligate employers to pay compensation for their employees' injuries.

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considered). *See also id.* at 157-58 n.30, *quoting County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979).

[6] Perhaps this is the origin of Judge Jones' observation in her dissent that if the court were starting over, it might have decided the matter differently. App. 17.

This statutory language seems to speak with sufficient clarity to preclude most judicial inquiry into its meaning. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992). It similarly should preclude any resort to agency deference. In referring to an injury or death "arising out of or in the course of employment . . . and such occupational disease . . . as arises naturally out of such employment" the most natural reading by far is that the condition must be related to the employment of the worker with the employer. It hardly makes much sense to suggest that the reference to "such employment" and "arises naturally" demonstrates congressional indifference to a cause and effect relationship between the employer and the employee and the injury or disease.[7] The term "naturally" is defined, *inter alia*, as "according to nature" or "according to the usual course of things." *Webster New Universal Unabridged Dictionary*, 2d ed. at 1197 (1944). The term "naturally", given its ordinary meaning, does not suggest a hidden intent on the part of Congress to impose liability on the basis of a hypothetical, remote, or fictitious connection or to attribute an injury to an employment that had no role whatsoever in causing it. An occurrence that is recognized solely as a matter of law is hardly a "natural" one. It is equally improbable that a Congress sitting in 1926, setting out to write the first federal workers' compensation

[7] Neither does it make much sense to read causation out of the statute on the basis of the court's decision in *Cardillo*. In *Cardillo*, the last employer probably contributed to the employee's hearing loss and, in any case, the employer made no factual effort to prove otherwise. *Cardillo* is mostly about the consequences of a contribution and not at all about the factual setting presented here where the scientific evidence refutes causation. Any stray words in *Cardillo* to the contrary are simply dictum.

statute and knowing that a constitutional challenge was sure to come, would radically depart from then current notions of liability to impose it so randomly that one employer is responsible by law for harm caused by another. *See Crowell v. Benson*, 285 U.S. 22, 42 (1932); *Larson's Workers' Compensation* §§ 2.07-2.08 at 2-12-2-18 (Desk ed.). Neither is there documentation in any original contemporary source that Congress intended to impose liability on any employer of an employee when the employer had no role to play in the worker's injury or disease. Congress gave the courts no mandate to impose liability hypothetically or to place administrative or judicial convenience above all other considerations. Section 2(2) of the Act, fairly read, precludes the imposition of liability by legal fiction.[8]

The court of appeals, however, found no impediment in section 2(2) to the imposition of liability on an innocent employer for several reasons. None are very persuasive. First, the court relied upon the same points found compelling in *Cardillo* – medical impossibility, Congress's rejection of a proposal to apportion liability among jointly liable employers, and convenience. A worse set of reasons for adopting the remarkable principle at issue here would be hard to conjure.

Even if medical science in 1955, could not assist in the designation of the last truly responsible employer, it is by

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[8] To the extent that the formulation by the court below erects a de facto irrebuttable presumption of responsibility based solely on exposure, the rule very likely violates section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d). *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267 (1994).

no means true today in some circumstances. More importantly, neither the *Cardillo* court nor the court of appeals below is competent to decree what is or is not medically possible in the absence of any proof either for today or for all times. *See Black & Decker Disability Plan v. Nord*, 123 S. Ct. 1965, 1971 (2003) (holding that courts are not competent, in the absence of empirical support, to reach a judgment that treating doctors' opinions are more likely to be correct than those of other doctors). To think that *Cardillo* relegates all science to irrelevance forever is a preposterous notion.

Equally unpersuasive is the notion relied upon in *Cardillo* and below that by rejecting a proposal to apportion liability, Congress implicitly endorsed the undesirable consequences threatened by the advocates of the proposal at a hearing, if Congress did not adopt the proposal. See App. 6-7. Whether Congress was indifferent to those consequences, or did not believe the threat, or had other reasons for rejecting the proposal is not known. No rule of construction nor any other authority justifies the inference drawn by the court of appeals that Congress simply intended last employer liability irrespective of true medical causation because it ignored the complaints of apportionment advocates that apportionment was the only way to avoid the irrational imposition of liability. Indeed, the complaint is not even true. If courts made a practice of discovering congressional intent by examining the arguments of the advocates of failed amendments, many of our laws would not be rationally interpretable at all. The Fifth Circuit's inference is neither supported by authority nor reasonable.

The court of appeals also found it relevant that the elimination of a rational connection or causation between

the disease and employment was in the best interest of claimants and employers because it made the litigation less complicated and more efficient. While efficiency and simplicity in adjudication are great virtues in workers' compensation matters, the point simply begs the question. There is no reason to believe that employers would raise causation issues frivolously or more or less frequently than they do now. *See, e.g.*, *Picinich*, 914 F.2d 1317; *Ronne*, 932 F.2d 836. Administrative efficiency also is not a basis for overriding the provisions of a statute. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997).

It is no less significant that many state workers' compensation authorities do not permit the imposition of liability for occupational diseases or cumulative injures on employers that prove their innocence.[9] There are no reports that the laws of these states are less efficient as a result.

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[9] *See Fairbanks No. Star Borough v. Rogers and Babler*, 747 P.2d 528, 531 (Alaska 1987); *Scott Co. v. Workers Comp. Appeals Bd.*, 188 Cal. Rptr. 537 (Cal. Ct. App. 1986); *Monfort v. Rangel*, 867 P.2d 122, 125 (Colo. App. 1993); *Flor v. Holguin*, 9 P.3d 404 (Haw. 2000); *Estave v. McCarty Corp.*, 464 So.2d 873, 875 (La.Ct.App. 1985); *CES Card Est. Serv., Inc. v. Doub*, 656 A.2d 332 (Md.Ct.Spec.App. 1995); *Busse v. Quality Insulation Co.*, 322 N.W.2d 206 (Minn. 1982); *United Methodist Senior Serv. v. Ice*, 749 So.2d 1227 (Miss.Ct.App. 1999); *Liberty Northwest Ins. Group v. Champion Int. Corp.*, 945 P.2d 433 (Mont. 1997); *Las Vegas Housing Auth. v. Root*, 8 P.3d 143, 146 (Nev. 2000); *Levas v. Midway Sheet Metal*, 721 A.2d 724, 731 (N.J. Super. Ct. App. Div. 1998); *Hardin v. Motor Panels, Inc.*, 524 S.E.2d 301 (Ohio 1998); *RLC Ind. v. Sun Studs, Inc.*, 16 P.3d 1208, 1209 (Or. App. 2001); *Titus v. Sioux Valley Hosp.*, 658 N.W.2d 388 (S.D. 2003); *Riley v. INA/AETNA Ins. Co.*, 825 S.W.2d 80 (Tenn. 1992); *Packer v. Fairdale Farms*, 699 A.2d 43 (Vt. 1997). *See also* Edward Vokoun, "Using the Last Exposure Rule in the Determination of Liability of Employers and Insurers for Occupational Diseases, 20 The Forum 102 (Journal of The Tort and Ins.

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Finally, the court below deferred to the Department of Labor's interpretation of section 2(2) mostly because of the Department's agreement with the *Cardillo* factors (medical impossibility, convenience and the legislative intent). App. 7-8. Deference is not appropriate in this setting. The Department has no relevant regulation, has never held rulemaking proceedings or hearings and has produced nothing more than briefs advocating the position to which deference is accorded.

Deference is appropriate for those briefs only to the extent they have the inherent power to persuade. The amount of respect an agency's position properly is accorded depends upon "[t]he degree of an agency's care, its consistency, formality, and relative expertness and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 219, 228 (2001) (footnotes omitted). Having accumulated no body of evidence, empirical or otherwise, the Department's reliance on the same tenuous factors cited in *Cardillo* and "me too" reaction to fairly unenlightening legislative history deserves neither deference nor much respect. The Department's position is no better than that of the advocates of apportionment in 1926. Both threaten terrible consequences for not agreeing with them based solely on unsupported speculation. That hardly is a good basis for denying an innocent employer the right to vindicate itself.

Practice Section of the American Bar Assn. 1984). In the federal black lung program, the last employer to expose the miner to coal dust is not always responsible where medical proof demonstrates that the harm was done by another employer. *Truitt v. North Am. Coal Co.*, 2 Black Lung Rep. (MB) 1-99 (Ben. Rev. Bd. 1979), *aff'd on other grounds sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.3d 1137, 1142-3 (3d Cir. 1980).

III. Liability Without Responsibility Is Bad Policy

Several courts have observed that an inflexible last-employer rule may seem "arbitrary" in some cases, but overall, "it is fair because all employers will be the last employer a proportional share of the time." *Newport News Shipbuilding and Dry Dock Co. v. Stilley*, 243 F.3d 179, 183 (4th Cir. 2001), *quoting Cordero*, 580 F.2d at 1336. The premise holds true and supports the rule in the great majority of cases, but where it does not work, the harm is significant and will become more significant over time.

Insurance principles work in a maximally rational way when risk of loss is allocated among the parties that are responsible for the harm. *See Larson's* at §§ 150.05-150.06 at 150-15 – 150-21. The principles are not well served when risk is spread irrationally or randomly. It is not "fair" for example, to penalize employers that maintain a safer and healthier workplace, or where losses are shifted from those who cause the risk to those who are innocent and are just in the wrong place at the wrong time. Innocent employers that maintain healthier workplaces do not merit their "proportional share" of other employers' liabilities.

Safety and health principles are undermined as well. The employer, for example, who maintains an asbestos-free or less hazardous workplace, invests substantial resources to achieve that better work environment. The employer expects a return on investment at least partly in the form of lower workers' compensation costs and a healthier workforce. Where mesothelioma is concerned, this is a particularly difficult matter for health conscious maritime employers that have abated risk and take precautions to avoid employee exposures, because they

may look forward to being the ultimate insurer of a very substantial future liability caused by others who were fully insured for those risks but are excused from liability by an unjustified and textually untenable strict liability rule. *See Ayers*, 123 S. Ct. at 1222-23 (noting medical research suggesting a substantial likelihood that persons exposed to significant asbestos in the past will eventually develop latent asbestos related cancers).

There is no clear benefit to the longshore community, either its employers or its employees, from a liability rule that places the compensation burden on innocent parties without giving them a chance to prove their innocence. That should be a fundamental right under the LHWCA and there was not in the past nor is there today any good and valid reason for eliminating this right.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 01-60480

NEW ORLEANS STEVEDORES; SIGNAL MUTUAL ADMINISTRATION, LTD.,

Petitioners-Cross-Respondents,

Versus

PEGGY IBOS, Surviving spouse of Bertrand Ibos, Jr.;

Respondent-Cross-Petitioner,

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, US DEPARTMENT OF LABOR,

Respondent.

Petition for Review of an Order of the
Benefits Review Board

January 16, 2003

Before KING, Chief Judge, and JONES and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

This case is on review of a judgment of the United States Department of Labor's Benefits Review Board (the "BRB"), affirming a decision of an administrative law judge (the "ALJ"). The ALJ held that New Orleans Stevedores ("NOS") is liable for compensation owed to Bertrand and Peggy Ibos (respectively, "Decedent" and "Claimant") under the Longshore and Harbor Workers' Compensation

Act (the "LHWCA"),[1] but is entitled to a credit against its total liability for the net amounts Claimant received by way of settlements with two of Decedent's earlier longshore employers and their insurers.

Decedent worked for various steamship and stevedoring companies for a period spanning nearly fifty years. During the Decedent's last three periods of employment, he worked for Valor Stevedoring Company ("Valor"), Anchor Stevedoring Company ("Anchor"), and, most recently, NOS. When Decedent experienced respiratory problems which were subsequently diagnosed as symptoms of mesothelioma caused by occupational exposure to asbestos, he stopped working and filed a claim for disability benefits under the LHWCA. Decedent died due to metastatic mesothelioma and Claimant, his widow, continued his disability claim and her own claim for survivor's benefits, naming Valor, Anchor, and NOS as the potentially responsible employers. Following referral of the claim to the Office of Administrative Law Judges, Claimant entered into approved settlement agreements with Valor and Anchor pursuant to § 8 (I), 33 U.S.C. § 908 (I), of the LHWCA. Accordingly, Valor and Anchor, and their respective carriers, were dismissed from the present claim. Claimant did not enter into settlement agreements with NOS.

In the case against NOS, the ALJ held that, because Decedent's last period of injurious exposure to asbestos occurred during his employment with NOS, NOS is the

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[1] Longshore and Harbor Workers' Compensation Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424, *as amended*, 33 U.S.C. §§ 901-950.

responsible employer under the LHWCA. The ALJ then awarded Claimant temporary total disability benefits for Decedent's period of disability, to be followed by death benefits. Additionally, the ALJ held that NOS is entitled to a credit for the net settlement proceeds paid to Claimant by Valor and Anchor for the same occupational injury that is the subject of this claim.

On appeal to the BRB, NOS and its insurance carrier, Signal Mutual Administration, Ltd. ("Signal"), challenged the ALJ's determination that NOS is the responsible employer. In a cross-appeal, Claimant challenged the ALJ's award of a credit to NOS for the settlement monies paid by Valor and Anchor. The BRB affirmed both the ALJ's determination that NOS is the responsible employer and the ALJ's decision to award a credit to NOS.

NOS and Signal now appeal the BRB's judgment affirming the ALJ's determination that NOS is the responsible employer. Claimant and the Director of the Office of Workers' Compensation Programs, United States Department of Labor (the "Director"), urge affirmance of the BRB's responsible employer determination. On cross-appeal, Claimant challenges the BRB's judgment affirming the ALJ's decision to grant NOS a credit for the settlements Claimant received from Valor and Anchor. NOS and Signal respond that the credit was properly awarded.

We must review two aspects of the BRB's judgment: (1) whether the BRB misapplied the "last exposure rule," in light of the medical-opinion testimony of record regarding the "latency period" of mesothelioma; and (2) whether, in affirming the ALJ's decision to award NOS a credit, the BRB misapplied the general credit doctrine adopted in

Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986) (en banc).

The BRB's final order is subject to review in the United States Court of Appeals for the circuit in which the injury occurred. 33 U.S.C. § 921 (c). We examine the BRB's decisions for errors of law to determine whether the BRB adhered to its scope of review. *Presley v. Tinsley Maint. Serv.*, 529 F.2d 433, 436 (5th Cir. 1976). Our review of the BRB's factual findings is limited to determining whether those findings are supported by substantial evidence on the record as a whole. *Tampa Ship Repair & Dry Dock Co. v. Dir., OWCP*, 535 F.2d 936, 938 (5th Cir. 1976). With respect to issues of law, our review of the BRB's rulings is de novo. *Pool Co. v. Cooper*, 274 F.3d 173, 177 (5th Cir. 2001).

The BRB's views are not entitled to deference because it is not a policy-making agency. *Cooper*, 274 F.3d at 177. We do, however, give deference to the Director's interpretations of the LHWCA. *Id.* The exact amount of deference that we owe to any given interpretation by the Director "'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Id.* (quoting *United States v. Mead Corp.*, 533 U.S. 218, 219, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944))).

NOS and Signal argue that the BRB misapplied the *Cardillo* "last exposure rule" because it failed to conduct a proper rebuttal inquiry into the question of whether Decedent's exposure to asbestos while employed with NOS

actually caused or contributed to Decedent's mesothelioma.[2] The premise of NOS's and Signal's argument is that § 2 (2) of the LHWCA requires that, for an employer to be held liable, the employee's exposure to an injurious condition while working for that particular employer must either cause or contribute to that employee's compensable condition in some demonstrable way. From this premise, NOS and Signal contend that the BRB erred when, in its rebuttal inquiry, it rejected the medical-opinion testimony of record concerning the "latency period" of mesothelioma which, according to NOS and Signal, suggests that there could not have been a true causal link between Decedent's exposure to asbestos while employed with NOS and the development of Decedent's mesothelioma. Specifically, NOS and Signal argue that they have met their burden of showing that a true causal link does not exist in this case, because the medical evidence of record demonstrated that

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[2] In occupational disease claims involving conditions caused by the cumulative effects of exposure over long periods of time, the "last exposure rule" identifies the liable party. The Department of Labor initiated this rule administratively, and it was first accepted for LHWCA claims by the Second Circuit in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 144 (2nd Cir.1955) (involving claims for hearing loss suffered by employees exposed to injurious stimuli in their last employment), *cert. denied*, 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800 (1955). Pursuant to the *Cardillo* "last exposure rule", the employer "during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award." *Id.* at 145. The rationale cited by the Second Circuit in adopting the rule was that, in light of the "present [poor] state of medical knowledge relating to these diseases," it is an administratively superior method that avoids the complexities of apportionment. *Id.* at 144.

the latency period for the development of mesothelioma is long enough to suggest that Decedent's development of mesothelioma began years before Decedent's last period of employment with NOS, and that any additional exposure to asbestos during that period had no impact on the course of his disease.

First, we disagree with NOS's and Signal's premise that, for purposes of liability, § 2 (2) of the LHWCA requires a true causal link between Decedent's exposure while working for NOS and the development of Decedent's mesothelioma. Under § 2 (2), there are two prongs to the statutory definition of a compensable "injury": "[1] accidental injury arising out of and in the course of employment, *and* [2] such occupational disease or infection [a] *as arises naturally out of such employment* or [b] as naturally or unavoidably results from such accidental injury[.]" LHWCA § 2 (2), 33 U.S.C. § 902 (2) (emphasis added). The Director interprets the "arises naturally out of" language of § 2 (2) to require only that the conditions of the employment be *of a kind* that produces the occupational disease. This interpretation is consistent with congressional intent, as it was first interpreted by the Second Circuit in *Travelers Ins. Co.* v. *Cardillo*, 225 F.2d 137 (2d Cir. 1955). In *Cardillo*, the Second Circuit found, as a matter of legislative interpretation, that Congress intended full liability to rest on the last exposing employer, regardless of the absence of actual causal contribution by the final exposure. *Cardillo*, 225 F.2d at 145.

We agree with *Cardillo*'s legislative interpretation. In the congressional hearings preceding the LHWCA's passage, an employer representative suggested that the LHWCA should include a provision limiting an employee's total recovery against a particular employer to the same

ratio as the extent of the harm done during the period worked for that employer bore to the total disability. *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearing before the House Judiciary Committee on H.R. 9498*, 69th Cong., 1st Sess. 72 (1926).[3] After discussion, those involved in the hearing accepted the employer representative's complaint that, without such a provision capping liability, a "last employer" would be liable for the full amount of compensation, even if the duration of the injured employer's employment was so brief that the injury would probably not be medically attributable at all to that "last employment." *Id.* at 74-75; *Cardillo*, 225 F.2d at 145. The suggested provision was not, however, incorporated into the LHWCA. We infer that Congress declined to adopt the suggested provision because it realized the administrative difficulties certain to arise if such a provision were incorporated into this section of the LHWCA. *Cardillo*, 225 F.2d at 145. As *Cardillo* recognized, "[t]he nature of occupational diseases . . . make[s] it exceedingly difficult, if not practically impossible, to correlate the progression of the disease with specific points in time or specific industrial experiences." *Id.* at 144. We therefore defer to the Director's interpretation that § 2 (2)'s "arises naturally out of" language requires only that the conditions of the employment be *of a kind* that produces the occupational disease, because "Congress intended that the employer during the last employment in which the

[3] The suggested provision stated: "But only such proportion shall be compensated by the employer in whose employment disability begins as the period employed by such employer bears to the total period of the accumulation of the disease."

claimant was exposed to injurious stimuli . . . should be liable for the full amount of the award." *Id* at 145.

Second, we agree with NOS and Signal that the BRB failed to articulate the appropriate legal standard to be applied by an ALJ in its rebuttal inquiry of an occupational disease claim brought under the LHWCA. The BRB reasoned that, in an occupational disease claim brought under the LHWCA, an employer can rebut an employee's prima facie case if that employer establishes that the claimant's exposure with that employer did not have the potential to cause the disease. Applying this standard, the BRB held that NOS did not satisfy its burden of proving that it is not the responsible employer on the basis of medical opinions concerning the "latency period" for the development of mesothelioma because "these opinions do not establish that the asbestos exposure experienced by decedent at NOS did not have the potential to give rise to mesothelioma." Contrary to the BRB's reasoning, the issue on rebuttal is not whether an employer can prove that a particular exposure with a particular employer did not have the potential to cause the disease. Neither is the issue on rebuttal whether an employer can prove that there is no evidence of a true causal link between a particular exposure and the development of the employee's disease. Rather, we have held that, after it is determined that an employee has made a prima facie case of entitlement to benefits under the LHWCA, the burden shifts to the employer to prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered

under the LHWCA for a subsequent employer when he was exposed to injurious stimuli. *Avondale Indus., Inc. v. Dir., OWCP* [*Cuevas*], 977 F.2d 186, 190 (5th Cir. 1992).[4] Thus, in the present claim, the only issue the ALJ was to consider in its rebuttal inquiry was whether NOS proved that exposure to asbestos did not cause Decedent's mesothelioma, regardless of whether the exposure Decedent experienced at NOS either caused or had the potential to cause Decedent's mesothelioma.[5]

Although the BRB failed to articulate the applicable legal standard, we find there is substantial evidence in the record as a whole to support the ALJ's finding that Decedent died of mesothelioma resulting from his overall

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[4] In *Cuevas*, we held: "[A] claimant does not have to prove that his employer is liable. Once he has demonstrated a prima facie entitlement to benefits by showing that he 'sustained physical harm and that conditions existed at work which could have caused the harm,' he has established that his 'exposure to injurious stimuli during employment covered under the [LHWCA], and there exists a compensable claim. Employer can then rebut this presumption by showing that exposure to injurious stimuli did not cause the harm . . . [or] that employee was exposed to injurious stimuli while performing work covered under the [LHWCA] for a subsequent employer.'" *Cuevas*, 977 F.2d at 190 (quoting *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 1986 WL 66392 at *2 (Ben. Rev. Bd. Nov. 28, 1986)).

[5] We note that two other major maritime circuits have rejected similar latency arguments in deciding asbestos-related claims under the LHWCA. *See Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 386-87 (4th Cir. 2000) (rejecting the last employer's latency argument and holding the last employer liable for the full amount of the claim); *Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 596 (9th Cir. 1989) (reasoning that the latency argument "suggests an unwarranted change of the 'last employer rule' set forth in [*Cardillo*] . . . which change we decline to adopt" (internal citation omitted)).

occupational exposure to asbestos.[6] NOS had an opportunity to present specific, comprehensive medical evidence disproving that Decedent's mesothelioma was caused by his exposure to any asbestos, but failed to do so.[7] Thus, we hold that the BRB properly affirmed the ALJ's judgment that NOS did not meet its burden of disproving Claimant's prima facie case.

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[6] The ALJ concluded that the "[m]edical evidence presented by Drs. Caputto, Martin, Abraham, M.D. Anderson, and Touro demonstrated that Claimant suffered from malignant mesothelioma related to occupational asbestos exposure." The only testimony NOS presented to rebut the evidence that Claimant suffered from mesothelioma was that of Dr. Sandler, who testified that Claimant did not clearly suffer from mesothelioma. However, the ALJ was not impressed by Dr. Sandler's opinion because Dr. Sandler is not a pathologist and because Dr. Sandler "did not take into consideration the overwhelming evidence of the pathologists who provided credible testimony and medical evidence in this case."

[7] This addresses the due process concerns raised by NOS and Signal, as well as its argument that the BRB inappropriately applied the last exposure rule as an "irrebuttable presumption." First, the ALJ's application of the last exposure rule did not prohibit genuine factual inquiry on the critical issues in this case. At the hearing before the ALJ, all parties were given the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Second, even though NOS and Signal argue that the last exposure rule is based on assumptions about the advances of medical science which may no longer be true, NOS's medical-opinion evidence concerning the latency period between the inhalation of asbestos fibers and the manifestation of mesothelioma only validates the Director's argument that the last exposure rule is still necessary for administering the statute. As the Director points out, the estimates of the latency period, ranging from ten to forty years, suggest that the "responsible" employer in the Decedent's case may possibly have been any one of the forty-one longshore employers he worked for over the course of his entire career.

II

Claimant argues that the ALJ's judgment that NOS is entitled to credit against its liability for the net amounts received by Claimant from the settling employers (Valor and Anchor) was an inappropriate application of the extra-statutory credit doctrine adopted in *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986) (en banc). It is also the Director's position that the amounts Claimant received from LHWCA settlements with Valor and Anchor are irrelevant to the amount owed by NOS and should not reduce its liability. We agree that the BRB erred in affirming the ALJ's application of the *Nash* credit doctrine in this context.

The *Nash* credit doctrine allows credit for the amount of a prior scheduled award, against a later scheduled award, based on a later injury to the same scheduled member, such as a leg. *See Nash*, 782 F.2d at 518-21. In *Nash*, the claimant sought compensation for successive, aggravating injuries to his leg, a scheduled member under 33 U.S.C. § 908 (c). *Nash* recognized that the BRB, in a series of its decisions, had developed an equitable credit doctrine to prevent the double compensation that might result from the peculiarities of the "aggravation rule," which requires an employer to pay full compensation for an employee disability, even if the work-related injury simply aggravated a preexisting disability sustained while working for a previous employer. *Id.* at 517-22. Under the BRB's credit doctrine, "where the worker has been actually compensated for disability to the same member at a previous point in time," the liability for the aggravation of that impairment should be reduced by the amount the worker has received for a part of the overall scheduled impairment. *Id.* at 518. Applying this credit doctrine, *Nash*

affirmed the BRB's judgment that the claimant's latest employer and its insurer (the defendants) should compensate the claimant for his entire thirty-four percent permanent partial disability to his leg resulting from three knee injuries, but that the ten percent compensation the claimant had actually received from a previous employer at an earlier date should be subtracted from the total award. *Id.* at 522.

Unlike *Nash*, Claimant has not sought compensation for successive, aggravating injuries. Rather, the settlements Claimant accepted were alternative to an entire award against either one of the settling employers, Valor and Anchor, who could have been held liable for such an award if found to be Claimant's last responsible employer. Thus, the *Nash* credit doctrine does not apply in this context, alternative liability for a single occupational injury, because the "aggravation rule" also does not apply.[8]

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[8] For the proposition that NOS is entitled to a credit for payments of compensation made by other potentially liable employers in settlement of Claimant's occupational disease claim, the BRB cited *Alexander v. Triple A. Machine Shop*, 32 BRBS 40, 44-46 (1998), *aff'd after remand*, 34 BRBS 34 (2000), wherein the BRB held that the *Nash* general credit doctrine applies in this context. The Ninth Circuit recently reversed the BRB's decision, holding that "denial of the credit is compelled by the purposes of the credit doctrine and 33 U.S.C. § 903 (e)." *Alexander v. Dir., OWCP; Triple A Machine Shop, Inc.*, 297 F.3d 805, 809 (9th Cir. 2002). The court reasoned that "the aggravation rule was not in play, and hence the credit doctrine was not applicable." *Id.* It further reasoned that "[a]pplying § 903 (e) against alternative settlement awards overzealously extends the provision beyond its intended purpose." *Id.*

Moreover, even though *Nash* applied an extra-statutory credit doctrine to the successive-scheduled-injuries context, we refuse to venture further outside the credit system provided in § 903 (e) in order to create a new extra-statutory credit doctrine in the context of this case. Had Congress intended for a liable employer to receive a credit against its total liability for sums the injured employee received by way of settlements under the LHWCA with previous employers, Congress would have explicitly provided for such a credit. Section 3 (e) permits credit for any past recovery, even against a different employer, "for the same injury, disability, or death" under "any *other* workers' compensation law" or under the Jones Act. 33 U.S.C. § 903(e) (emphasis added). Section 3 (e) makes no mention of a credit being available for a prior recovery under the LHWCA itself. Its legislative history indicates the reason. In 1984, Congress enacted the new § 3 (e) to alter the result of the then-recent decision of *United Brands Co. v. Melson*, 594 F.2d 1068 (5th Cir. 1979), thereby enabling liable employers to receive credit for recoveries an employee received from former employers pursuant to a state workers' compensation law. *See* 130 Cong. Rec. 25905 (Sept. 18, 1984) (statement of Sen. Erlenborn) ("The offset would, therefore, apply . . . where the employee's nonlongshore claim is against an employer other than the one against whom he has filed a longshore claim. Accordingly, the court's decision on this point in *Melson* . . . is overruled.").[9] Congress did not address the

[9] In *Melson*, we held that, because there was no provision in the LHWCA allowing a liable employer credit for recoveries paid to the employee by a different employer pursuant to state law, no such credit was available. *Melson*, 594 F.2d at 1074-75.

question of whether a liable employer can or should receive credit for LHWCA settlements paid to the employee by former employers. Congress' silence on this particular question, we conclude, indicates that it did not intend for employers to receive such credits.[10] We therefore defer to the Director's interpretation that the amounts Claimant received from LHWCA settlements with other employers, before the determination that the disability and death were compensable and that NOS is the liable employer, are irrelevant to the amount owed by NOS and should not reduce its liability.

For these reasons, we hold that the BRB erred in affirming the ALJ's judgment granting credit to NOS for Claimant's net settlement receipts from Valor and Anchor.

III

In conclusion, we AFFIRM the BRB's judgment affirming the ALJ's determination that NOS is the responsible employer. We REVERSE the BRB's judgment affirming the ALJ's decision that NOS is entitled to credit for Claimant's net settlement receipts from Valor and Anchor,

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[10] *See ITO Corp. v. Dir., OWCP* [*Aples*], 883 F.2d 422, 425 (5th Cir. 1989) (reasoning that § 3 (e) has no application to prior recoveries under the LHWCA; it only applies when the prior compensation was paid under a state workers' compensation provision or the Jones Act). *Cf., e.g., Ceres Gulf v. Cooper*, 957 F.2d 1199, 1205-07 (5th Cir. 1992) (reasoning that the several provisions of the LHWCA providing for the recoupment of overpayments out of an unpaid compensation otherwise payable, without provision for other forms of recoupments, demonstrates that there is no remedy available against the claimant for recoupment of overpayments where no further compensation is due).

and REMAND for proceedings that are not inconsistent with this opinion.

EDITH H. JONES, Circuit Judge, dissenting:

With due respect to my colleagues, I dissent from the decision to overturn the BRB's award of dollar-for-dollar credit to New Orleans Stevedores for the amounts paid in settlement to Ibos's widow by his previous employers Valor and Anchor. In consequence of the majority decision, Mrs. Ibos recovers considerably more benefits than she would with a single application of LHWCA compensation. The majority's rationale is that the credit doctrine is "extra-statutory," and although this court approved the doctrine in a previous en banc decision,[11] the majority will not "extend" the doctrine to this allegedly distinct situation.

The majority, in my view, too lightly disregards *Nash*, which approved the BRB's now 30-year old credit doctrine expressly because that rule assures fairness both to employees and employers – guaranteeing full reimbursement to the former while protecting the latter against double payments of benefits. Although *Nash* arose from an aggravating injury, there is no persuasive reason to distinguish last employer rule cases and aggravation rule cases. The difference between the names is more a matter of identification than substance. Under both rules, the last employer to expose the claimant to the cause of the injury or disease is responsible for the entire compensation

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[11] *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 518-22 (5th Cir. 1986) (en banc).

award.[12] As this court has acknowledged, the last employer rule "can operate inequitably where a claimant worked only a minimal time for the last covered employer." *Avondale Indus., Inc. v. Director, OWCP*, 977 F.2d 186, 190 (5th Cir. 1992). In aggravation rule cases "[t]he credit doctrine was developed to prevent double recoveries where the worker has been previously compensated *for the same disability*." *ITO Corp. v. Director, OWCP [Aples]*, 883 F.2d 422, 427 (5th Cir. 1989) (emphasis added). This is consistent with one of the primary objectives of LHWCA: "to protect employers who are subjected to absolute liability by the Act." *Louviere v. Shell Oil Co.*, 509 F.2d 278, 283 (5th Cir. 1975) (*quoting Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412, 74 S. Ct. 202, 206 (1953)). The majority, however, is willing to allow a double recovery in this case because it nominally falls within the last employer rule rather than the aggravation rule.[13]

In fact, one might reasonably read *Cardillo* itself, which originated the extra-statutory last employer rule, to be an aggravation rule case. *See Cardillo*, 225 F.2d at 140-42 (claimants suffered permanent hearing loss due to exposure while working for various employers); *Avondale Indus., Inc.*, 977 F.2d at 189 n.1 (stating that "the aggravation rule allows a complainant compensation where

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[12] In fact, under the last employer rule, the last employer need not be an actual cause, but simply a potential cause of the occupational disease. *Avondale Indus., Inc.*, 977 F.2d at 190.

[13] In fact, the aggravation rule finds its origins in the last employer rule. *Foundation Constructors, Inc. v. Director, OWCP [Vanover]*, 950 F.2d 621, 623 (9th Cir. 1991); *see also Bath Iron Works Corp. v. Dir., OWCP*, 244 F.3d 222, 228 (1st Cir. 2001) (stating that the aggravation rule "is really nothing more than a variation of the last employer rule").

work-related acoustic trauma aggravates or combines with a prior hearing impairment"). If *Cardillo* is fairly read to represent an aggravation of an occupational injury or disease, then this court is bound by *Nash* to apply the credit rule.

The majority reasons that the credit rule must be limited because it is "extra-statutory." That reasoning simply flies in the face of the *Nash* decision, which upheld the credit rule notwithstanding its extrastatutory character. Moreover, the credit rule doctrine operates here to ameliorate the dramatic consequences of another *judicially created* rule. The majority purports to defend the last employer rule as if it had been approved by Congress, but this court has characterized it otherwise, as "a *judicially created rule* for allocating liability among employers in cases where an occupational disease develops after prolonged exposure)." *Avondale Indus., Inc.*, 977 F.2d at 190 (emphasis added) (quotation omitted).

If these issues were questions of first impression, we might look at no more than the statutory language of the LHWCA and might conclude that there is no justification for the last employer rule or the credit doctrine. Given the wealth of precedent, however, we are not free to roam. We are justifiably bound by a fifty-year old last employer rule, a thirty-year old credit doctrine, a fifteen-year old en banc decision of this court (*Nash*) and ten-year old interpretations of the foregoing (*Avondale Indus.* and *Aples*). Only by picking and choosing among the authorities does the majority reach the patently inequitable result in this case.

I respectfully **DISSENT**.

BRB Nos. 00-828 and 00-828A

PEGGY IBOS (Surviving Spouse of BERTRAND J. IBOS, Jr.) Claimant-Respondent Cross-Petitioner v. NEW ORLEANS STEVEDORES and SIGNAL MUTUAL ADMINISTRATION LIMITED Employer/Carrier- Petitioners Cross-Respondents NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS *Amicus Curiae*	)	DATE ISSUED: 05/09/2001 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Seelig, Cosse, Frischhertz & Poulliard), New Orleans, Louisiana, for claimant

Mark E. Solomons (Greenberg Traurig L.L.P.), Washington, D.C., for New Orleans Stevedores and Signal Mutual Administration.

Charles T. Carroll, Jr. (Wilcox, Carroll & Froelich, PLLC), Washington, D.C., for National Association of Waterfront Employers.

Before: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (99-LHC-0305) of Administrative Law Judge Clement J. Kennington rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Bertrand J. Ibos, Jr. (decedent) was employed by various steamship and stevedoring companies as a clerk, superintendent, gear man, and stevedore from 1947 to 1995. During decedent's last three periods of employment, he was employed by Valor Stevedoring Company (Valor) from 1978 to 1984, Anchor Stevedoring Company (Anchor) from 1985 to 1993, and New Orleans Stevedores (NOS or employer) from September 1993 to October 11, 1995. In August 1995, decedent experienced respiratory problems which subsequently were diagnosed as symptoms of mesothelioma caused by occupational exposure to asbestos. As the result of decedent's mesothelioma, he was forced to discontinue working on October 11, 1995. Decedent filed a claim for disability benefits under the Act, and on February 14, 1996, died due to metastatic mesothelioma. Thereafter, his widow (claimant) continued his disability claim and her own claim for survivor's benefits, naming Valor, Anchor and NOS as the potentially

responsible employers. Following referral of the claim to the Office of the Administrative Law Judges, claimant entered into approved settlement agreements pursuant to Section 8(i), 33 U.S.C. §908(i), of the Act, with Valor and Anchor, and accordingly, those two employers and their respective carriers were dismissed from the instant claim.

In his Decision and Order, the administrative law judge initially found that because decedent's last period of injurious exposure to asbestos occurred during the course of his employment with NOS, NOS is the responsible employer under the Act. The administrative law judge then awarded claimant temporary total disability benefits for decedent's period of disability from October 11, 1995 to February 14, 1996, and death benefits from February 15, 1996, and continuing. *See* 33 U.S.C. §§908(b), 909. The administrative law judge further found that NOS is entitled to a credit for the net settlement proceeds paid to claimant by Valor and Anchor for the same injury that is the subject of the instant claim.

On appeal, NOS challenges the administrative law judge's determination that it is the responsible employer. The National Association of Waterfront Employers (NAWE), which has been granted permission to participate as *amicus curiae* in the instant case, also challenges the administrative law judge's designation of NOS as the responsible employer. Claimant responds, urging affirmance of the administrative law judge's responsible employer determination. Claimant, in her cross-appeal, challenges the administrative law judge's award of a credit to NOS for the settlement monies paid by the other two longshore employers. NOS responds that the administrative law judge correctly awarded it a credit for the settlement proceeds paid by Valor and Anchor.

Responsible Employer

We note, at the outset, that it is undisputed that decedent's exposure to asbestos while in the course of employment covered under the Act caused his mesothelioma. Thus, the issue presented by employer's appeal is not the compensability of the claim itself but, rather, the identity of the employer responsible for the payment of compensation under the Act. *See Norfolk Shipbuilding & Drydock Corp. v. Faulk,* 228 F.3d 378, 34 BRBS 71 (CRT) (4th Cir. 2000), *cert. denied*, 121 S.Ct. 855 (2001); *Avondale Industries, Inc. v. Director, OWCP [Cuevas]*, 977 F.2d 186, 26 BRBS 111 (CRT) (5th Cir. 1992); *see also Suseoff v. The San Francisco Stevedoring Co.,* 19 BRBS 149 (1986). Once it is determined that the employee's employment exposures as a whole are causally linked to his disease, the compensability of the claim (*i.e.,* whether the employee had a work-related injury) has been established pursuant to Section 20(a) of the Act, 33 U.S.C. §920(a). The remaining issue is the determination of the employer responsible for the payment of compensation. *See Suseoff*, 19 BRBS 149. In order to determine employer liability in occupational disease cases involving successive employers, the courts and the Board have uniformly applied the last employer rule enunciated in *Travelers Insurance Co v. Cardillo,* 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). *See, e.g., Faulk,* 228 F.3d 378, 34 BRBS 71 (CRT); *Cuevas,* 977 F.2d 186, 26 BRBS 111 (CRT); *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT) (9th Cir. 1991); *Jacksonville Shipyards, Inc. v. Director, OWCP,* 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988). Pursuant to the last employer rule, the last covered employer to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for

any compensation owed under the Act. A distinct aggravation of an injury need not occur for an employer to be held liable as the responsible employer; rather exposure to potentially injurious stimuli is all that is required under the *Cardillo* standard. *See Lustig v. Todd Pacific Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989).

The intent underlying the last employer rule is to avoid the difficulties and delays in the administration of the Act that would result if apportionment of liability among multiple employers was required. *Cardillo,* 225 F.2d at 145. The *Cardillo* court recognized that "[t]he nature of occupational diseases . . . makes it exceedingly difficult, if not practically impossible, to correlate the progression of the disease with specific points in time or specific industrial experiences." *Id.* at 144. *Accord Newport News Shipbuilding & Dry Dock Co. v. Stilley,* 243 F.3d 179 (4th Cir. 2001); *Faulk,* 228 F.3d at 384, 34 BRBS at 75 (CRT); *Port of Portland,* 932 F.2d at 841, 24 BRBS at 144 (CRT). In recently reaffirming the importance of the last employer rule in furthering the prompt and efficient administration of claims, the United States Court of Appeals for the Fourth Circuit in *Stilley* reasoned that if apportionment of liability among successive employers were permitted, processing of claims "would be substantially delayed as employers resorted to expert testimony and scientific evidence in an effort to prove that other employers should share a percentage of liability." 243 F.3d at 182.

In order to meet its burden of establishing that it is not the responsible employer, an employer must prove either that the employee's exposure while working for

employer was not injurious or that the employee was exposed to injurious stimuli while working for a subsequent employer covered under the Act. *See Faulk,* 228 F.3d at 384, 34 BRBS at 75 (CRT); *Cuevas,* 977 F.2d at 190, 26 BRBS at 113 (CRT); *see also General Ship Service v. Director, OWCP [Barnes],* 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991). An injurious exposure is one which had the potential to cause the disease or harm at issue. *See Faulk,* 228 F.3d at 385, 34 BRBS at 75 (CRT); *Cuevas,* 977 F.2d at 190, 26 BRBS at 113 (CRT); *Todd Pacific Shipyards Corp. v. Director, OWCP [Picinich],* 914 F.2d 1317, 1320, 24 BRBS 36, 39 (CRT) (9th Cir. 1990). In the instant case, NOS contends that the administrative law judge misapplied the last employer rule in finding NOS to be the responsible operator where, as asserted by NOS, decedent's exposure to asbestos while employed by NOS had no causal link to his disability or death.[1]

In the case at bar, as decedent had no employer subsequent to NOS, the only way in which NOS could have established that it was not the responsible employer would have been to demonstrate that decedent's exposure to asbestos while working for NOS did not have the *potential* to cause his disease. *See Faulk,* 228 F.3d at 385, 34 BRBS at 76 (CRT). In his consideration of this issue, the administrative law judge properly noted that there is no *de minimis* standard for exposure to injurious stimuli in order to hold an employer liable under the Act. *See* Decision and Order at 22; *Faulk,* 228 F.3d at 387-388, 34

[1] NOS does not contest the administrative law judge's determination that decedent had some exposure to asbestos in the course of his employment with NOS. *See* Petitioner's brief at 5.

BRBS at 78 (CRT); *Cuevas,* 977 F.2d at 190, 26 BRBS at 113 (CRT); *Fulks v. Avondale Shipyards, Inc.,* 637 F.2d 1008, 1012, 12 BRBS 975, 978 (5th Cir.), *cert. denied,* 454 U.S. 1080 (1981). Furthermore, the administrative law judge properly recognized that a demonstrated medical causal relationship between the employee's exposure and his occupational disease is not required. *See* Decision and Order at 22; *Faulk,* 228 F.3d at 387-388, 34 BRBS at 78 (CRT); *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 692, 31 BRBS 178, 185 (CRT) (9th Cir. 1997); *Port of Portland,* 932 F.2d at 840, 24 BRBS at 143 (CRT); *Franklin v. Dillingham Ship Repair,* 18 BRBS 198 (1986).

The crux of NOS's argument on appeal is that the medical evidence of record demonstrates that, in light of the long latency period for the development of mesothelioma, decedent's mesothelioma began long before he began working for NOS in 1993, and any additional exposure to asbestos during his employment with NOS had no impact on the course of his disease. NOS contends that this medical evidence satisfies employer's burden of establishing that it is not the responsible employer. We disagree. In *Faulk,* Norshipco, the claimant's last employer, advanced a similar latency argument with respect to the claimant's mesothelioma. Specifically, Norshipco asserted that because the claimant in that case experienced abdominal symptoms prior to the time that he was exposed to asbestos aboard the USS Flint during his employment with Norshipco, and because of the long latency period for mesothelioma, it was factually impossible for the claimant's employment with Norshipco to have contributed to his disease. The Fourth Circuit rejected Norshipco's argument, holding that the evidence failed to support the inference that due to the long latency period,

it was factually impossible for the claimant's exposure at Norshipco to have caused his mesothelioma. *See Faulk,* 228 F.3d at 387, 34 BRBS at 77 (CRT). In rendering this determination, the court found it significant that the claimant was not diagnosed with mesothelioma until after the USS Flint incident. Moreover, the court noted that while Norshipco produced a physician's opinion that claimant's exposure while aboard the USS Flint did not cause his mesothelioma, the physician did not state that such exposure did not have the potential to cause the disease. *Id.* Similarly, the Ninth Circuit in *Lustig* rejected the insurance carrier's argument that there is a ten-year latency period for asbestos-related cancer and that any asbestos exposure after that time period would not have had any effect on the claimant's disability. The *Lustig* court ruled that the carrier's argument represented an unwarranted change of the last employer rule enunciated in *Cardillo. Lustig,* 881 F.2d at 596, 22 BRBS at 162 (CRT).

The decisions of the Fourth Circuit in *Faulk* and the Ninth Circuit in *Lustig,* in which latency arguments were rejected, are supported by the reasoning of the *Cardillo* court in approving the last employer rule. In examining the legislative history of the Act, the Second Circuit in *Cardillo* noted that Congress had rejected a suggested provision to apportion employer liability on the basis of the extent of damage done during the period of employment with a particular employer. The court observed that Congress "acknowledged that, absent such a provision, a last employer 'would be liable for the full amount recoverable, even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that last employment.'" *Cardillo,* 225 F.2d

at 145. The court concluded that the importance accorded by Congress to the efficient administration of claims overrode Congressional concern for any apparent injustice in holding an employer liable for an injury that probably was not attributable, medically, to employment with that employer. *Id.* In its recent decision in *Stilley,* the Fourth Circuit restated the principle that notwithstanding that the last employer rule is rather arbitrary, it provides an equitable method for allocating liability because "all [maritime] employers will be the last employer a proportional share of the time." *Stilley,* 243 F.3d at 183, quoting *Cordero v. Triple A Machine Shop,* 580 F.2d 1331, 1336, 8 BRBS 744, 747 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). *See also Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1285, 16 BRBS 13, 16 (CRT) (9th Cir. 1983), *cert. denied,* 466 U.S. 937 (1984); *Justice v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 97, 99 (2000).

In the instant case, as in *Faulk,* 228 F.3d at 387, 34 BRBS at 77 (CRT), decedent was not diagnosed with mesothelioma until after he was exposed to asbestos while employed by NOS. Both the instant case and *Faulk* are factually distinguishable from *Port of Portland,* 932 F.2d at 840, 24 BRBS at 143 (CRT), in which the Ninth Circuit held that it was factually impossible for the claimant's employment with the employer to have contributed to his hearing loss where the audiogram determinative of his hearing loss was administered before the claimant began his employment with the employer. While the *Port of Portland* court declined to "impose liability on an employer who *could not,* even theoretically, have contributed to the causation of the disability," 932 F.2d at 841, 24 BRBS at 143 (CRT), the impossibility, *even theoretically,* of a causal relationship between decedent's asbestos exposure at NOS

and his disability and death has not been established in the instant case. As long as decedent's exposure at NOS had the potential to cause mesothelioma, that exposure is considered to be injurious, and NOS is responsible for the claim. *See Faulk,* 228 F.3d at 385-387, 34 BRBS at 75-78 (CRT); *Cuevas,* 977 F.2d at 190, 26 BRBS at 113 (CRT); *Picinich,* 914 F.2d at 1320, 24 BRBS at 39 (CRT).

As previously discussed, the courts uniformly have rejected challenges to the last employer rule that are premised on the argument that it is inequitable to hold the last covered employer liable for an occupational disease that in all likelihood was not medically caused by employment with that employer. *See Stilley*, 243 F.3d at 179; *Faulk,* 228 F.3d 378, 34 BRBS 71 (CRT); *Cuevas,* 977 F.2d 186, 26 BRBS 111 (CRT). Contrary to the arguments of both NOS and NAWE, the *amicus curiae*, our rejection of NOS's latency argument does not give rise to an irrebuttable presumption that the last covered employer, in all cases, is responsible for payment of the claim in contravention of the United States Supreme Court's decision in *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43 (CRT) (1995). Rather, as recently noted by the Fourth Circuit in *Stilley,* 243 F.3d at 184, an employer can avoid liability entirely if it does not expose its employees to disease-causing conditions. Moreover, the last covered employer has been held not to be the responsible employer where it established that the claimant's exposure with that employer did not have the potential to cause the disease. *See Picinich,* 914 F.2d 1317, 24 BRBS 36 (CRT).

We hold, therefore, that NOS has not satisfied its burden of proving that it is not the responsible employer on the basis of medical opinions regarding the long latency period for the development of mesothelioma. *Faulk,* 228

F.3d at 386-387, 34 BRBS at 77 (CRT); *Lustig,* 881 F.2d at 596, 22 BRBS at 162 (CRT). As these opinions do not establish that the asbestos exposure experienced by decedent at NOS did not have the potential to give rise to mesothelioma, they are insufficient to relieve NOS of liability for this claim. *Id.; see also Cuevas,* 977 F.2d at 190, 26 BRBS at 113 (CRT); *Picinich,* 914 F.2d at 1320, 24 BRBS at 39 (CRT); *Franklin,* 18 BRBS at 199.[2] We therefore affirm the administrative law judge's determination that NOS is the responsible employer.

Credit

We next consider claimant's contention, raised on cross-appeal, that the administrative law judge erred in awarding NOS a credit for the settlement proceeds paid by claimant's previous longshore employers, Valor and Anchor. The administrative law judge found that application of the general credit doctrine, which functions to prevent the double recovery of benefits where the claimant has been previously compensated for the same disability, supports a credit in this case. *See Strachan Shipping Co. v. Nash,* 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986) (*en banc*). We affirm the administrative law

[2] In light of our holding, we need not specifically address NOS's arguments regarding the administrative law judge's findings with respect to a causal relationship between decedent's asbestos exposure at NOS and any immune system and cellular damage which decedent may have sustained. Inasmuch as NOS has not established that decedent's exposure at NOS did not have the potential to cause mesothelioma, any extraneous findings by the administrative law judge regarding asbestos-related medical conditions that decedent may have had, independent of his mesothelioma, need not be considered.

judge's determination that NOS is entitled to a credit for payments of compensation made by other potentially liable employers in settlement of claimant's occupational disease claim. *See Alexander v. Triple A Machine Shop,* 32 BRBS 40, 44-46 (1998), *aff'd after remand,* 34 BRBS 34 (2000). In *Alexander,* the claimant settled, pursuant to Section 8(i), his claims for asbestos-related disease against other potentially responsible longshore employers prior to the administrative law judge's award of compensation, which was payable by responsible employer Triple A Machine Shop. The Board held that the general credit doctrine supports Triple A's entitlement to a credit for previous payments toward the claimant's disability due to his occupational disease. The Board reasoned that under rationale set forth in *Cardillo,* 225 F.2d 137, in the case of an occupational disease, the last covered employer to expose claimant to potentially harmful stimuli prior to claimant's awareness of his injury is liable for claimant's entire disability. Where an employer is found to be the responsible employer, it is wholly liable for claimant's disability. As claimant's other longshore employers had no legal obligation to contribute to claimant's compensation, Section 8(i) settlement payments paid by them could result only in claimant's receiving a double recovery. Thus, the Board concluded that as one employer is liable for the entire disability, a credit for previous payments toward that disability is proper to avoid double recovery. *Alexander,* 32 BRBS at 45.

Claimant's reliance on the decision of the Fifth Circuit in *ITO Corp. v. Director, OWCP, [Aples],* 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989), is misplaced, as *Aples* is clearly distinguishable from the case at bar. In *Aples,* the claimant sustained multiple traumatic back injuries in the course of his employment with successive longshore employers. The claimant received a settlement payment

from a previous longshore employer which represented that employer's liability for the claimant's permanent partial disability; thereafter, ITO, the claimant's subsequent employer, was found to be responsible for the payment of permanent total disability benefits. The *Aples* court denied ITO a credit for the previous employer's settlement payment, reasoning that the claimant had not received a double recovery inasmuch as the amount of the claimant's permanent total disability award was based on his wage at the time of the second injury, which reflected the dimunition in his earning capacity caused by the first injury. As opposed to the *Aples* case involving multiple traumatic injuries with successive employers, the instant case involves an employer who is held solely liable for the entire disability caused by decedent's occupational disease. Thus, pursuant to our holding in *Alexander,* we affirm the administrative law judge's award of a credit to NOS for the net settlement proceeds previously paid by Anchor and Valor for the same disability.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

s/ _____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

s/ _____
ROY P. SMITH
Administrative Appeals Judge

s/ _____
NANCY S. DOLDER
Administrative Appeals Judge

U.S. Department of Labor [SEAL]

Office of Administrative Law Judges
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DATE ISSUED: April 13, 2000

OWCP NO.: 07-137700

CASE NO.: 1999-LHC-305

IN THE MATTER OF

BERTRAND J. IBOS, JR (DECEASED),

Claimant

v.

NEW ORLEANS STEVEDORES,

Employer

and

SIGNAL MUTUAL ADMINISTRATION, LTD.,

Carrier

APPEARANCES:

Lloyd N. Frischhertz, Esq,
On behalf of the Claimant

Edward P. Lobman, Esq.
On behalf of the Employer and Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Peggy Ibos (P. Ibos), the widow and survivor of deceased employee Claimant, Bertrand J. Ibos, Jr.[1] (Claimant), against New Orleans Stevedores (NOS) and Signal Mutual Administration, Ltd. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before me on December 13, 1999, at Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post hearing briefs in support of their positions. Two other employers were included in the initial claim filed by Claimant, Anchor Stevedoring Company, Inc., (Anchor) and Valor Stevedores (Valor). Subsequently Anchor and Valor entered into 8(I) settlements, the latter employer settling for $17,000.00 and the former employer settling for $133,000.00, whereupon Claimant moved to dismiss them and their respective insurers (Insurance Company of North America and Aetna Casualty and Surety Company) from the instant claim. Based upon these settlements and the fact that neither NOS or its Carrier objected to this motion, I granted Claimant's motion to dismiss.

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[1] Bertrand J. Ibos is referred to as Claimant. His widow, Peggy Ibos is referred to as P. Ibos.

Claimant testified and through counsel introduced thirty-two exhibits, which were admitted into evidence, (CX-1 to CX-4; CX-6 to CX-14; CX-16 to CX-32), including Social Security Earnings Records, Income Tax Returns, Ibos/Anchor 8(I) Settlement, Ibos/Valor 8(I) Settlement, Anchor Assignment, Ibos video deposition, Death Certificate, Marriage Certificate, NOS records on the LaPaix, the funeral bill, NOSSA/ILA pension records, Touro Infirmary Hospital records, M.D. Anderson's records, Dr. Howard Sandler's report and deposition, Dr. Jerrold Abraham's reports, Pendleton Memorial Hospital records, Dr. Salvador Caputto's records and deposition, Dr. Harry Johnson's records, Dr. Isaac Kirshbom's records, Henry Flanagan's deposition, Dr. Pamela Martin's records and deposition, Dr. Gordon Goldman's report, photographs of Anchor/Cooper office, Claimant's records of ships worked, Captain John Manders' report, Alan Jurisich's deposition, and photographs of asbestos damaged cells. In addition, Claimant's counsel called Ronald Macke and P. Ibos as witnesses. Employer introduced two exhibits, which were admitted into evidence, (EX-1 to EX-2), including Dr. Howard Sandler's report and a report completed by Kevco Laboratory and Consulting Services analyzing product samples from the NOS gear shop and office.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witnesses' demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Jurisdiction was established and Claimant's injury was covered under the Act.

2. A timely claim and notice of such claim were filed by Claimant and NOS timely filed a notice of controversion.

3. Claimant became symptomatic with mesothelioma in August of 1995, but he actually continued to work until October 11, 1995.

4. Claimant's average weekly wage, at the time of his injury, was $1,450.00, based on earnings of $85,000.00 in the previous year, with a corresponding compensation rate of $760.92.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Whether Claimant died of asbestos induced mesothelioma.

2. Whether Claimant was exposed to asbestos while working for NOS.

3. If Claimant was exposed to asbestos while working for NOS, does this constitute exposure to injurious stimuli so that NOS should be held liable for the full amount of an award under the Act.

4. If NOS is found to be the last responsible employer, are they entitled to a credit for settlements Claimant's

widow received from prior stevedoring employers, Anchor and Valor.

III. STATEMENT OF THE CASE

A. Chronology:

Claimant, Mr. Bertrand Ibos, born in the [sic] New Orleans on September 27, 1929, worked his entire adult life for various steamship and stevedoring companies, including some in which he retained ownership. Prior to his death on February 14, 1996, he had been married to P. Ibos for nine years. They had no minor/dependent children (CX-6, pp. 5-6).

In 1947, Claimant began working as a clerk for Ryan Walsh Inc. and Waterman Steamship Company. In 1951, and years thereafter, he began working as a clerk for several stevedoring/shipping companies, including: NOS (1951-1995-first period of employment), TTT Ship Agencies Inc., States Marine Line Co., Isthmian Steamship, Strachan Shipping Co., ITO Corp., Standard Stevedoring Co., Inc., Harbor Service Inc., Intercontinental Shipping Corp., Delta Steamship Lines Inc., (also referred to as J.P. Florio), Tidemann & Dalton Inc., Alcoa Steamship Co. Inc., Standard Fruit & Steamship Co., Luckenbach Gulf Steamship Co. Inc., Cooper-T Smith Stevedoring Co. Inc., Hansen & Tidemann Inc., Fowler & McVitie Inc., United Stevedoring Corp., Lykes Corp., Kenneth Leblanc Inc., Wesley Shipping Co. Inc., T. Smith & Son Inc., States Marine Isthmian Agency Inc., International Longshoremens Assoc., Coastwise Marine Service of Louisiana, Ayers Steamship Agency Inc., Southern Stevedoring Co. Inc., Dalton Steamship Corp., James J. Flanagan Shipping Corp., Copper Stevedoring of Louisiana Inc., Southern

Dock Co. Inc., E. S. Binnings Inc., Lykes Bros. Steamship Co. Inc., Pelican Stevedoring Co. Inc., James Stevedores Inc., Mid-Gulf Stevedores Inc., Valor Stevedoring Co., New Orleans Steamship Assoc., and Anchor Stevedoring Co. Inc. (CX-1, CX-6, pp. 7-10). By 1954 and until 1970, Claimant's work with Texas Transport and Thermal Co., (TTT) occupied a significant part of his working time, during which he worked not only as a clerk, but also as a superintendent. (Tr. 58; CX-6, pp. 10-11). Claimant was next employed as a clerk and superintendent for James Stevedoring from 1970 to 1978.

From 1978 to 1984 Claimant worked for Valor as a clerk, general superintendent, part owner, and gear man. (CX-6, pp. 20, 23). From 1985 to 1993 Claimant was a part owner, acting president, and superintendent for Anchor. (CX-6, pp. 26-3 2). During this time period he also served as a traveling port captain for one of Anchor's chief customers, Botacchi Shipping. Claimant's second employment with NOS was from September, 1993 to October 11, 1995, as a clerk, stevedore, and superintendent. (CX-6, pp. 70-72).

On August 13, 1995, while working for NOS Claimant became short winded and was treated for presumed pneumonia by internist, Dr. Harry Johnson, who when Claimant's condition did not improve referred him to pulmonary specialist, Dr. Stephen Hebert at Touro Infirmary in New Orleans. (CX-6, pp. 90-91). Dr. Hebert diagnosed Claimant with hydropneumothorax of unknown etiology, *i.e.*, a collapsed lung with fluid present. Subsequently, he was found to have a malignant tumor of his pleura. Pathology studies were performed on August 22, 1995 and August 26, 1995 by Dr. Donald M. Bradburn, Dr. Paul A. Riehi, and Dr. Pamela C. Martin, indicating

pleural fluid with necrotic connective tissue and reactive and atypical mesothelial hyperplasia. (CX-12). Additional pathology studies were performed on August 29, 1995 by Dr. Martin, indicating anaplastic malignant neoplasm, noting that mesothelioma, as well as malignant lymphoreticular lesions should be considered. Dr. Johnson discharged Claimant from his initial stay at Touro, for which he had been admitted on August 21, 1995, with the diagnosis of: pneumothorax pleural effusion, and probable mesothelioma.

Dr. Hebert subsequently referred Claimant to thoracic surgeon, Dr. Issac Kirshom at Touro who performed thoracic surgery on August 29, 1995. During the surgical intervention, Claimant's cancerous condition was generally identified. During postoperative confinement Claimant was referred to oncologist, Dr. Salvador Caputto. Post operative roentgenologic findings were positive for mesothelioma and lung tumor. (CX-12).

On September 12, 27, October 16 and 23, 1995, Dr. Caputto treated Claimant for lung cancer and mesothelioma. At Claimant's request Dr. Caputto referred Claimant for further evaluation at M.D. Anderson in Houston, Texas. There he was evaluated by Dr. William Murphy who concurred in Dr. Caputto's diagnosis of mesothelioma and subsequently underwent chemotherapy.

Dr. Caputto's treatment of Claimant in December of 1995 was unremarkable. However, on December 29, 1995, Claimant was readmitted to Touro with chest pain and dyspnea. Dr. Caputto discharged Claimant on December 31, 1995, with advanced metastatic mesothelioma, respiratory insufficiency, and intractable pain. Claimant was readmitted to Touro on January *5,* 1996, with chest pain

and shortness of breath. Clinical evaluation also found new liver metastasises [sic]. The liver continued to be enlarged upon palpation resulting in Dr. Caputto's diagnostic impression of metastatic advancing mesothelioma. Claimant died on February 14, 1996 from metastatic mesothelioma.

An assessment from the pathological sample of Mr. Ibos' lung tissue was performed and reported by Dr. Abraham in April of 1998. The tissue was digested leaving asbestos fibers and asbestos bodies, which were analyzed using both light and electron microscopy. No asbestos bodies were found at the detection limit used on light microscopy. The total concentration of asbestos fibers longer than 3 microns on electron microscopy was 33,800 fibers per gram of dry lung. The types of fibers included amosite, crocidolite, chrysotile and tremolite asbestos fibers. The length of the fibers was noted to be consistent with the dimensions of asbestos fibers indicating the likelihood of an occupational exposure source and known to produce mesothelioma. (CX-17).

B. Claimant's Testimony

Claimant testified that he had no history of serious health problems, and had only been hospitalized on three occasions, prior to 1995, once as a child for a tonsillectomy, once for one-day surgery to remove a cyst from his back in 1984, and one overnight stay after severing the tip of his finger in a 1990 occupational injury. (CX-6, p. 168-70, 206). Upon his 1990 admission to Touro for the severed finger, Claimant completed a physical and x-rays were taken of his chest, the results of which were normal. (CX-6, p. 322). On that occasion, Claimant became acquainted with Dr.

Johnson, who completed Claimant's physical examination upon said 1990 admission to Touro. Admittedly, Claimant smoked cigars for about twenty-five years and both of his wives were heavy cigarette smokers. (CX-6, 219).

Aside from recounting his general work history and medical treatment history, Claimant testified in detail concerning the time frame encompassing August 1984 through September 1993, when he worked for Anchor as a stevedore, shipping superintendent, clerk, and/or served other various job functions. (CX-6 pp. 37, 41). During said time frame, Claimant was the President of Anchor and a fifty percent owner of the business entity. As Chief Executive Officer of the corporation, Claimant's participation therein was purely ministerial. (CX-6, pp. 109-11).

As an Anchor employee, Claimant testified about exposure to asbestos from late 1988 through 1989. During this time frame Claimant traveled as a port captain for one of Anchor's primary customers, Botacchi Shipping, sailing the Punta Ankler, the Punta Malvinos, and the Punta Norte. (CX-6 pp. 41, 45). Although Claimant could not recall the referenced vessels carrying asbestos-type products, he asserted that asbestos exposure came from the vessels engine room where sprayed asbestos insulation was used to cover pipes and tubing. (CX-6, 46-47, 61).

Claimant also testified about asbestos exposure in Anchor's gear yard building located at 3038 Tchoupitoulas Street in New Orleans, Louisiana. In March of 1990 the business office of Anchor was relocated to 3038 Tchoupitoulas Street. Anchor maintained a gear yard building and offices at said location leasing the premises from Cooper T. Smith, Inc. Claimant went into the yard and building on a daily basis. (CX-6, pp. 226-29). Claimant believed, but

could not confirm the fact, that asbestos insulation was used at the gear yard building.

As noted above, Claimant was employed with NOS for the time frame encompassing September of 1993 through December of 1995. (CX-6, pp. 70-72). He served NOS in the job capacities of hiring and shipping superintendent, as well as a stevedore, clerk, and served other various job functions. (CX-6, pp. 130-33). Claimant testified that while working for NOS he was exposed to asbestos while helping to unload the, vessel La Paix in December 1993 and at the NOS gear shop offices. The La Paix carried both rolls and coils of asbestos. Prior to the La Paix's arrival in New Orleans, the asbestos cargo had been carried in an unsealed fashion as bulk cargo and then transferred to a container on the ship. Claimant supervised the unloading of the asbestos and was in the back of the container while the asbestos, which was very dusty, was removed or stripped by forklifts and deposited on the Nashville Wharf. In addition, Claimant boarded the La Paix and went into the hold where the asbestos had been stored, which was very dusty. (CX-6 pp. 59,78-80, 210-214).

Lastly, Claimant testified about possible asbestos exposure: (1) while helping to unload foreign and old ships that were typically in disrepair and made prior to the imposition of construction regulations; (2) at NOS Chartres Street gear shop and office, which he visited over a [sic] 100 days in a two year period, where loose black insulation was hanging from the ceiling and where asbestos brake shoes were removed; and, (3) at the former Anchor gear yard when retrieving equipment on a regular basis to be used in NOS operations. (CX-6, pp. 59-61, 80-87, 216-17, 268-70).

To support Claimant's testimony about asbestos exposure, Claimant's Counsel called P. Ibos (Claimant's widow) and Ronald Macke (co-owner of Anchor and fellow employee at NOS), introduced the depositions of Henry Flanagan (Claimant's supervisor at NOS) and Alan Jurisich (industrial hygienist), as well as a report compiled by Captain John Manders listing the ships which Claimant boarded during the course of his employment with NOS. Captain Manders' researched the construction and history of said ships, utilizing United States Coast Guard Records and completed corresponding reports of his findings.

C. Testimony of P. Ibos

P. Ibos married Claimant on July 18, 1987, while he was working for Anchor. (TR. 115-16). P. Ibos testified that she frequently accompanied her husband as he performed stevedoring assignments, which included clerking, gear work, and working on ships. P. Ibos went aboard ships with Claimant and met with the ship officers as Claimant discussed unloading operations. (Tr. 117-18). On occasion, she even sailed with Claimant while he served as port captain on Bottachi vessels. P. Ibos's presence on the vessels with Claimant allowed her to provided [sic] detailed testimony about Claimant's work which required him to work in all ship areas. (Tr. 119-22, 134).

P. Ibos testified that Claimant's work for NOS from 1993 to 1995 was essentially the same as the work he did for Anchor, and during which time at NOS she accompanied him on vessels about 90% of the time. (Tr. 119-127). Additionally, she went to the wharfs where Claimant worked for NOS to bring him lunch about two to three

times a week. P. Ibos testified that Claimant always checked the ship thoroughly, and she frequently observed Claimant coming out of the ships' holds. Relevant to Claimant's work at Anchor, P. Ibos identified for the court pictures of the Anchor gear yard, which she and Gordon Goldman took subsequent to Claimant becoming sick. (Tr. 128). P. Ibos recounted the fact that while Claimant was working for NOS, he often went to get equipment from the Anchor gear office, frequently accompanied by her. (Tr. 133).

P. Ibos testified that Claimant had no health problems until August of 1995, save the prior mentioned incidents of a severed finger, resulting from an occupational injury, and a cyst removal from Claimant's back. (Tr. 128). P. Ibos admitted her history of heavy smoking and Claimant's history of smoking cigars. (Tr. 134). By August of *1995* Claimant was stressed out and tired, feeling short of breath and suffering from a cough, as well as a collapsed lung. P. Ibos recounted Claimant's medical history, noting that Dr. Kirshbom diagnosed Claimant with mesothelioma, and subsequently Dr. Caputto and M.D. Anderson also diagnosed Claimant with mesothelioma. (Tr. 129-31). P. Ibos testified that Claimant stopped working due to mesothelioma on October 10, or 11, 1995, leading to his subsequent death on February 14, 1995.

D. Testimony of Ronald Macke

Ronald Macke (Macke) met Claimant in 1955 when they were both working for Texas Transport and Thermal (TTT). At that time, Claimant was doing clerk work and some superintendent work. Thereafter they worked together at James Stevedores, Valor, Anchor, and at NOS

from September 1993 to December 1994. Macke recounted the facts of Claimant's general daily work activities, including Claimant's frequent and daily visits aboard vessels, in the holds, and on deck of said vessels, which was consistent with other testimony provided throughout the hearing. (Tr. *5* 8-60, 63-64).

Macke testified that at Valor Claimant served as vice president and general superintendent, while he was the secretary/treasurer and in charge of the office. At Anchor, Claimant was the president while he was the secretary/treasurer. Claimant ran the stevedoring operations, loading, unloading, and sailing Bottachi vessels as needed, while Macke ran the office. (Tr. 61-62). Anchor was a small company with an enclosed gear yard on Tchoupitoulas and Eighth Street, which they inhabited for three to four years. Macke testified that Claimant would go into the gear yard on a daily basis while working for Anchor to check on and retrieve equipment. Asbestos was in the siding of the building enclosing the gear yard and would break off easily requiring Macke and Claimant to replace broken off pieces of siding with tin. (Tr. 63-67). In addition, Macke testified that asbestos cargo was discharged while he and Claimant worked at Valor and Anchor, but could not provide any particulars about the vessels involved. (Tr. 109).

Macke testified that Anchor ceased operations in 1993. Thereafter, Claimant went to NOS as a general superintendent and Macke followed him to NOS in September 1993. In 1993, Anchor sold a toploader to NOS and thereafter Claimant would periodically loan stevedoring equipment located in the Anchor gear yard to NOS to unload ships. (Tr. 68-7 1). On these occasions, Claimant would have to spend significant periods of time to "root

around" to physically remove the equipment from the enclosed yard area, which had damaged asbestos siding on the walls. (Tr. 68-71, 98-102). Pictures of the damaged asbestos siding appear in CX-26.

When Claimant was aboard vessels for NOS, Macke would converse with him via telephone, and by going out to the wharfs sometimes to meet Claimant for lunch or to discuss business. Macke would go to the wharf to compare cargo order reports versus the manifest for discrepancies. (Tr. 113-14). Once or twice Macke went on board a vessel to see Claimant, but generally he would relay a message or wait for Claimant to come off the ship. Still, from the wharf Macke could see Claimant on vessels. (Tr. 86-97).

Macke testified that Claimant kept hand written records concerning the ships that he handled at NOS. (CX-27[2]; Tr. 73-74). Macke recounted the facts of the La Paix incident, testifying that as the general superintendent, Claimant would naturally oversee the whole operation of discharging the vessel. (Tr. 75-81).

Relevant to other possible asbestos exposure in the NOS office, Macke testified that the NOS office floor had broken asbestos tiles, and Claimant certainly walked over the tiles. However, Macke could not testify whether Claimant was near the broken tiles. (Tr. 82-84, 111; EX-2). In addition, Macke testified that the roof in the NOS gear yard had a black webbing substance, that looked like it may have been blown in at one time. However, this area has been redone since that time, and no testing of the

[2] CX-27 formed the basis for Captain Manders' subsequent report at CX-28, 29.

substance was done prior to removal. Claimant frequently went to the warehouse to deal with the gear men, which had a mechanic shop where they repaired forklifts, fifth wheels, or whatever needed repair. Nevertheless, Macke could not identify the presence of specific equipment in the shop used for repairs, other than the existence of a drum, in which old parts would be thrown, awaiting disposal. (Tr. 85-86).

E. Testimony of Henry Flanagan

Henry Flanagan (Flanagan), Claimant's supervisor at NOS, from 1993-1995, testified as to Claimant's general daily work activities for NOS. (CX-23, pp. 5-6). Claimant performed the duties of a superintendent and clerk, which required him to regularly go aboard vessels, entering areas such as the ship's quarters, the deck, and the ship's hold, as well as participating in the direct operations of going from barge to ship and vice versa, and loading and unloading barges. (CX-23, pp. 13-15). Containerized cargo constituted a significant part of NOS's business, as well as occasionally stuffing containers with general cargoes, which would have occurred at the Alabo Street or the Henry Clay/Nashville Wharf. (CX-23, pp. 23-24).

Flanagan testified that NOS handled potentially hazardous materials, which sometimes came with a Materials Safety Data Sheet (MSDS) warning NOS of the potential danger. (CX-23, pp. 27-30, 65-66). The MSDS may include information about special handling measures, such as how to safely store the cargo in order to prevent contamination or how to prevent an increasingly hazardous situation. However, the MSDS did not generally indicate the use of any protective equipment.

NOS handled a hundred plus vessels per year, including barges, general cargo vessels, bulk carriers, and container vessels. (CX-23, p.33). Flanagan testified concerning the motor vessel La Paix, which was handled by NOS relevant to Claimant's employment with NOS. The La Paix carried asbestos cargo, as Macke pointed out to Flanagan, prior to the La Paix reaching port at the NOS Nashville Wharf. (CX-23, p. 34, 39, 65-66). This was a discharge operation with containerized cargo, as well as cargo in the holds. Following Macke's notice about the asbestos cargo, Flanagan contacted Chris Wientjes (Wientjes), the port captain of Acadia Ship Brokers, Ltd., the customer in relation to the cargo at issue on the La Paix, and informed Wientjes that NOS would not enter the hatch with asbestos in the hatch. Flanagan testified that he instructed Wientjes to remove the asbestos from the hatch, which Wientjes purportedly agreed to do. (CX-23, pp. 41, 46-48). The La Paix manifest identified the asbestos as forty rolls said to contain asbestos cloth, as well as twelve wooden boxes said to contain asbestos rope, which was stored in hatch number three. (CX-23, p. 50).

However, when the La Paix arrived in New Orleans the asbestos had already been containerized and was on the ship's deck. Before NOS was aware of said container's contents, the container had already been offloaded by NOS onto the Nashville Wharf. (CX23, pp. 55-56). Upon notification of such offloading, Flanagan again contacted Wientjes instructing him that NOS would not open the container nor handle the cargo, and Wientjes was to remove the container from NOS's terminal. (CX-23, p. 58-60). Nonetheless, Flanagan was subsequently notified that Wientjes had stripped the container, while at the Nashville Wharf, and loaded the asbestos cargo into some other means of

transportation, of which stripping activities were completed in the presence of NOS employees, including Claimant.

Flanagan was not aware of asbestos cargo being involved in any other vessels during the course of NOS's normal handling of the ships' files in 1993, 1994, and 1995. (CX-23, pp. 35-38). Other than the asbestos exposure relevant to this claim, NOS had no other records of handling asbestos-containing products, nor had NOS conducted any lead abatement or handled medical reports concerning asbestos. (CX-23, pp. 61-62). Additionally, Flanagan testified that NOS's counsel had arranged for asbestos testing of samples from NOS's gear yard and offices at the 3023 Chartres Street location, which tests' results he believed to have been normal, showing no evidence of asbestos products or material.

F. Testimony of Dr. Caputto

Claimant's treating physician, Dr. Caputto, was deposed on September 4, 1996. Dr. Caputto is board certified by the American Board of Internal Medicine, the American Board of Internal Medicine, Medical Oncology, and the American Board of Internal Medicine, Hematology, as well as being licensed to practice medicine in Louisiana. Dr. Caputto acquired his Doctorate in Medicine in 1968, from the Universidad Nacional de Cordoba Argentina, and was a Resident at St. Vincent Hospital, in Worcester, Ma. from 1972-1973, as well as the Chief Medicine Resident of the Tulane/Touro Program in 1974. Dr. Caputto is also a member and active staff of Touro Infirmary, St. Charles General Hospital, Chalmette Medical Center, Mercy Hospital, Pendleton Memorial

Methodist Hospital, and Lakeland Hospital. (CX-20, pp. 81-82).

In essence, Dr. Caputto recounted the multiple treatments he provided to Claimant from September 12, 1995, when he first saw Claimant via consultation at Touro, following Claimant's thoracotomy and original diagnosis of malignancy or neoplastic disease, until Claimant's death on February 14, 1996, the cause of which Dr. Caputto determined to be mesothelioma. (CX-7; CX-19, p. 14; CX-20). Concerning the cumulative effect of asbestos exposure and mesothelioma, Dr. Caputto opined that the higher the degree of exposure, the higher the risk of resulting mesothelioma. (CX-20, pp. 22-23). Dr. Caputto testified that two possible risks exist for someone who had exposure to asbestos just a few years before the cancer developing event, if that person had also been exposed to asbestos many years before said event: (1) the risk of malignancy; and, (2) the risk of inducing more symptoms because of the effect of dust in the lung function, with both risks being somewhat independent from the cancer. (CX-20, p. 24).

Dr. Caputto testified that Claimant's prior mentioned and unremarkable chest x-ray, taken in December of 1994, indicated that Claimant's mesothelioma was a disease with an aggressive course, and/or that Claimant may have had a mesothelioma that was not seen on x-ray the year before. (CX-20, pp. 25-26). Additionally, Dr. Caputto viewed the pathologists' reports made by Dr. Gordon Flake and Dr. Martin on August 30, 1995, September 11, 1995, and September 25, 1995 that Claimant may or may not have had a mesothelioma as being based on Claimant's atypical manifestation of a malignancy and cancer, with a clinical presentation consistent with a mesothelioma, thus resulting in Dr. Martin's diagnosis of a tumor consistent

with a mesothelioma. (CX-20, p. 29). In short, the pathologists reported that the findings were supported for mesothelioma, and Dr. Caputto's interpretation of their findings was that the tumor had characteristics that made the tumor more like mesothelioma than carcinoma. (CX-20, p. 32, 46-47).

Concerning Claimant's involvement of the liver, Dr. Caputto testified that the CT scans were more consistent with hepatic metastases than hepatic carcinoma, stating that migrations to the liver were not uncommon with such a large tumor and advanced disease, noting that mesothelioma generally gives metastases later than lung cancer. (CX-20, pp. 48-49). Dr. Caputto next testified that Claimant exhibited no clinical evidence of angiocarcinoma. Additionally, while agreeing that the malignancy period of mesothelioma is typically in excess of ten to fifteen years, Dr. Caputto could not completely rule out the possibility of the disease process occurring within a decade of the first exposure, considering the question outside of the scope of his expertise. (CX-20, pp. 57-58).

Dr. Caputto would generally expect to see a history of hazardous asbestos exposure, and some pathological evidence of asbestosis, with a diagnosis of pleural mesothelioma, such as Claimant's mesothelioma. Although, Dr. Caputto does not necessarily expect to see an underlying case of asbestosis, meaning a radiological or pathological diagnosis of asbestosis, in all patients suffering from mesothelioma. (CX-20, pp. 51-56, 59-60, 64). Furthermore, Dr. Caputto would define hazardous asbestos exposure as exposure to friable, or free and airborne, asbestos fibers, which may occur if a building is in disrepair. Conversely, hazardous asbestos exposure would not include short exposure to non-friable contained asbestos, for example,

asbestos in a protected wall that nobody is working on. (CX-20, pp. 61-62). Although Claimant had not been diagnosed with asbestosis, Dr. Caputto testified that Claimant exhibited signs suggesting pathologically that he suffered from mesothelioma, and notwithstanding the fact that there were some other signs that could have supported the diagnosis of other tumors, those other signs were not inconsistent with mesothelioma. (CX-20, pp. 64-65, 71-72). Dr. Caputto based his diagnosis of mesothelioma on Dr. Martin's pathological report, which Dr. Caputto deemed to be consistent with mesothelioma, radiographic evidence, and Claimant's clinical presentation of massive disease in the embodiment primarily of the pleura without having a specific lung mass. (CX-20, pp. 66-68, 73-77). Notably, Dr. Caputto's diagnosis of Claimant's condition was also shared by the treating group at M.D. Anderson.

G. Testimony of Dr. Martin

Dr. Martin, an expert in the field of pathology, was deposed on February 3, 2000. She is licensed to practice medicine in Louisiana and is board certified by the American Board of Pathology, Anatomical and Clinical, as well as Dermatopathology. Dr. Martin diagnosed Claimant with anaplastic malignant neoplasm compatible with malignant mesotheioma of the pleura. (CX-31, p. 7). In Dr. Martin's opinion, Claimant's tumor developed in late 1994 or early 1995 and was a rapidly growing tumor. (CX-31, p. 9, 12). Dr. Martin testified that although many tumors have their own personalities, the generally accepted latency period for mesothelioma associated with asbestos is usually between ten and forty years. (CX-31, p. 10). She defined latency period, as the time from which a substance or

material that is associated or known to be a carcinogen, from the time the insult occurs to that tissue, to the time it takes to develop a tumor.

In regards to Claimant, Dr. Martin explained that asbestos fibers become aerosolized and the patient inhales them. The amphiboles have a less likelihood of clearance where crysotiles can be cleared. They are then inhaled by the lung where they often incite a cellular reaction. Often they can go into the septal tissues of the lung and they can incite cytocons being released from inflammatory cells, causing cellular injury. Often they will be associated with small amounts of hemorrhage and many times hemosiderin, which is blood pigment, coats the fiber, so there is damage at the cellular level. (CX-31, pp. 17-19). Asbestos exposures are usually small exposures over an extended period of time, causing small injuries over a prolonged period of time. Dr. Martin testified that even if the disease process is already in place, when a patient is exposed to asbestos, injury occurs on a cellular level, but said injury will not change the progression of the disease if it is already in place. Thus, Claimant's exposure two years before his disease process makes it unlikely that it was the causative event. (CX-31, pp. 24-29). Nonetheless, said asbestos exposure can cause injury at a subclinically detectable level. (CX-31, p. 20). In short, Dr. Martin testified that asbestos exposure while Claimant was employed by NOS would not have changed the course of his disease process, but injured the lung tissue at a cellular level harming immune cells and lung tissue. (CX-31, pp. 22-23, 30).

Dr. Martin recounted the details of the reports and studies she performed at Touro, testifying that those studies made it more likely than not that it was

mesothelioma. She described the results of staining patterns completed on Claimant's lung tissue as being an unusual pattern for mesothelioma, but not inconsistent with mesothelioma, possibly reflecting the aggressiveness of the tumor and an early death. (CX-31, pp. 31-41). Dr. Martin identified Claimant's tumor as an aggressive form of mesothelioma, a sarcomatoid form.

H. Testimony of Dr. Sandler

Dr. Sandler, a physician licensed to practice medicine in Maryland, who specializes in occupational and environmental medicine, was deposed on June 2, 1999. (EX-1, pp. 3-5). Dr. Sandler reviewed the medical evidence as provided by Dr. Caputto, Touro, and M.D. Anderson, as well as reviewing the Claimant's deposition, taken February 8, 1996. In addition, Dr. Sandler requested that Dr. David Prince, a pulmonologist, who is also a class-B reader, review the chest x-rays (taken August 22, 1995 and December 29, 1995) and CAT scans (taken August 11, 1995, October 13, 1995, and December 29, 1995) on Claimant. (EX-1, pp. 22-25, Sandler, exhibit 5). Dr. Prince found that Claimant did not have associated findings of significant asbestos exposure. (EX-1, p. 26). Specifically, Claimant did not have either interstitial fibrosis of asbestos exposure, commonly known as asbestosis, nor did he have pleural plaques or thickening that are markers of significant asbestos exposure. (EX-1, p. 27). Dr. Sandler testified that Dr. Prince's findings confirmed for him Dr. Abraham's findings on tissue digestion of a relative level of background exposure to asbestos.

In Dr. Sandler's opinion, Claimant did not clearly suffer from mesothelioma, reasoning that certain aspects

of Claimant's disease looked like mesothelioma and others did not. Admitting that he is not a pathologist, and not qualified to perform a pathological analyses of the cells and the presentation on the slides and the staining of tissue, he based his determination that Claimant did not clearly suffer from mesothelioma on the fact that there had been difficulty in making a definitive diagnosis of mesothelioma. However, Dr. Sandler could not rule out mesothelioma based on the information in Claimant's medical history. (EX-1, pp. 26-28).

Assuming that Claimant did have mesothelioma, Dr. Sandler testified that in his opinion the La Paix incident, and any potential exposure relevant to that incident, had no causal relationship to Claimant's mesothelioma. He based his opinion on the long latency period of mesothelioma, the fact that upon diagnosis of a mesothelioma, it is usually at a stage that is very advanced, and that the types of fibers he opined to have been generally used in the production of rope and cloth were chrysotile, which is not recognized as being the most pathogenic for mesothelioma. In addition, unless the cloth and rope was friable, as friable asbestos creates a greater risk, no danger to exposure would likely have existed. (EX-1, pp. 29-30, 58-60). Furthermore, Dr. Sandler testified that the levels that have been potentially associated with chrysotile exposure for the production of mesothelioma are much higher than what Dr. Abraham found in Claimant's case. In summary, Dr. Sandler testified that the December 1993 La Paix incident did not result in any exposure that was sufficient to cause adverse health effects, nor if one had occurred, it was not of the correct timing to cause mesothelioma nor would it be able to create any sort of change,

modification, acceleration, or aggravation of a cancer that was already present. (EX-1, pp. 31-35).

Dr. Sandler testified that the tumor would have been present four to eight years before it was diagnosed in 1995, basing his opinion on the double rate of growth of cancer cells. (EX-1, pp. 52-53). Dr. Sandler agreed with Dr. Martin's opinion that cumulative exposure is a factor in developing a mesothelioma, emphasizing that the cumulative exposure must still be within the latency period. (EX-1, pp. 55-57). In conclusion, Dr. Sandler does not believe, based on the tissue sample analysis that there was sufficient exposure to asbestos to be causative of Claimant's mesothelioma. (EX-1, p. 60-61).

I. Testimony of Dr. Abraham

Dr. Abraham, a pathologist and professor of pathology at the Health Science Center at Syracuse, reviewed Claimant's pathology records and biopsy slides from Touro, which were sent to Dr. Abraham by Dr. Sandler for analysis. Dr. Abraham testified in a letter to Dr. Sandler dated March 19, 1998, that Claimant clearly had a strong occupational history of asbestos exposure, confirming the malignant mesothelioma evident in particular biopsy slides. Based on this information, Dr. Abraham concluded, with a reasonable degree of medical certainty, that said occupational asbestos exposure was the probable cause of Claimant's malignant mesothelioma. (CX-16).

Dr. Abraham further testified, relevant to Claimant's condition and a digestion analysis that he completed on Claimant's lung tissue, in a letter to Dr. Sandler dated April 13, 1998. The digestion analysis confirmed Claimant's exposure to asbestos fibers of both commercial

amphibole and chrysotile types, in the size ranges known to be associated with mesothelioma risk. The concentrations were slightly above the upper limits of background for commercial amphiboles, and the dimensions of the chrysotile and tremolite are indicative of occupational exposure, although the concentrations are within background ranges, noting that in the background population, such long fibers are not seen. (CX-17).

J. Testimony of Alan Jurisich

Alan Jurisich (Jurisich), an expert board certified industrial hygienist, testified that asbestos, because of its toxicity, was banned under a 1988 EPA regulation called TOSCA. (CX-32, pp. 5-13). After reviewing Claimant's medical records concerning the instant claim, the depositions, and Manders' report, Jurisich opined that Claimant died from asbestos induced mesothelioma. Jurisich agreed with Dr. Abraham's opinion that Claimant had a strong occupational history of asbestos exposure, that asbestos is well recognized as a leading cause of mesothelioma, and that it is medically certain that Claimant's occupational exposure caused his malignant mesothelioma. (CX-32, pp. 14-20). In doing so, Jurisich noted not only the long occupational history, but also the strong physical histological evidence that Claimant was exposed to asbestos most likely from an occupational setting due to the length of the asbestos fibers present in Claimant's lungs. (CX-32, pp. 21-25).

Jurisich also reviewed Manders' reports of, identifying 328 ships that Claimant worked on while at NOS. Most of the ships were foreign ships, with many being Russian ships and ships from the former Soviet Union. Jurisich

considered these types of ships to be extremely high risk for containing asbestos and being poorly maintained. (CX-32, pp. 25-28). Notably, the former Soviet Union was the third largest producer of asbestos in the world. They did not recognize the hazards associated with asbestos, going so far as to build houses out of asbestos containing minerals and rocks.

Relevant to injurious exposure, Jurisich testified that the latency period of mesothelioma has a real minimum of twenty years, based on the Lamplier study, which was reported in the Journal of Occupational Medicine. (CX-32, pp. 29-30). Jurisich considered the task that Claimant was involved in with the La Paix incident as being high risk for asbestos exposure. (CX-32, pp. 31-32). Just as Flanagan was adamant that the asbestos would not be unloaded by NOS crew, Jurisich would have had the same concerns. Jurisich viewed the 4.2 tons of asbestos on the La Paix, being handled as break cargo or loose asbestos, meaning other cargo was on top of the cargo, as being high risk for asbestos exposure. Because the asbestos had been moved to a container above ship before reaching port in New Orleans, they had to strip, or physically unload, the container in New Orleans. Jurisich testified that, as reported by Claimant, it was dusty in the hold and the container where the asbestos had been stored, with forklifts going in and out, indicating aggressive handling.

The appropriate manner for handling such material would have been to use a haz mat crew, unless the asbestos was completely polyed over, which was not the case with the La Paix asbestos material. (CX-32, p. 35). As an industrial hygienist, Jurisich would have used respirators and protective clothing for any task like that. Jurisich testified that with no indication of the asbestos material

being wrapped with polyed, completely wrapped and airtight, because of the manner in which the cargo was handled, in his opinion, Claimant had contact with friable asbestos, which he would have inhaled. (CX-32, p. 43). Again, based on the record of the La Paix incident, Jurisich testified that what remained in hold number three, where the bulk asbestos had been stored, was more likely residual asbestos dust, and some of the residual dust probably settled, creating a lesser chance than that created by stripping the container, of injurious exposure. (CX-32, pp.44-45).

Jurisich agreed with the leading expert in the field of asbestos and disease, Dr. Selikoff, that asbestos fibers cause injury to the immune system on a cellular level. The fibers are deposited into the lungs, where they stay, phagocytes come along and try to attack the asbestos fiber, but for some reason are unsuccessful in their attack. These phagocytes – then dissolve and release chemicals into the lungs, which do not belong there. Additionally, macrophages, which are part of the immune system, begin to disintegrate as they come into contact with asbestos. (CX-32, pp. 36-38). This is creating injury on a cellular level, which has been demonstrated on photomicrographs of the lungs of people with asbestos in their lungs. The aforementioned physiological mechanisms have been seen in certain stages and outlined as such. (CX-32, p. 39). This subsequent cellular injury to the immune system, caused by asbestos in the lungs, occurs regardless of whether the mesothelioma tumor actually exists at the time of the exposure. Relying on the book Toxicology of the Immune System, Jurisich testified that asbestos has an immunotoxic potential to induce either hypersensitivity or other types of immune injury. (CX-32, p. 40).

Jurisich completed an analysis at the NOS Chartres Street office and gear yard, which indicated asbestos in the tile mastic on the floor. In his opinion, there could have been asbestos exposure, but he did not give much significance to that possible exposure. (CX-32, pp. 48-49). Jurisich testified that he does not know whether exposure occurred in the NOS gear yard due to work around brake shoes, which Claimant had alluded to via counsel and Macke's testimony. Again, Jurisich placed far less significance on said possible exposure than the La Paix incident. (CX-32, p.53).

Jurisich testified that if asbestos was in the piping and in the insulation of aspects of the cabins, as well as engine room, of the 328 ships Claimant came into contact with while employed by NOS, and Claimant actually entered those areas of the ships, this would have probably exposed Claimant to friable asbestos that would have been inhaled into the lungs.

K. Captain Manders' Report

Manders researched a list of vessels that he compiled from Claimant's handwritten notes, referencing the 1993-94 Lloyds Register of Shipping (Register) in the United States Coast Guard Foreign Vessel Inspection Division Library. Said vessels were vessels that Claimant went aboard while employed by NOS. Some ships' names were indecipherable and Manders could not find others in the Register, which ships he listed simply as foreign. Manders indicated that all of the ships were listed as general cargo ships, designed to carry break-bulk cargo. Although some containerized cargo was carried, the vessels were not specifically designed as container ships and were not listed

as such. Manders described the work involved as lab or intensive, hot, dirty work, involving the stirring up of plenty of dust. As a clerk or superintendent, Claimant would have been required to frequently go into the cargo holds and spaces to inspect, measure and check cargo, moving between these ship areas and the dock, dock office, and warehouse. Manders speculated that Claimant would have spent a great deal of time on board said vessels and if asbestos was carried in cargo or used in the ships construction, Claimant would have been exposed to any friable dust present.

Most of the vessels were foreign built, foreign flagged, and twenty years older or more. The American vessels were between twenty-five and thirty-three years old, almost all of which were old Lykes Line Ships. Many of the ships were registered under a Flag of Convenience (IFOC). Manders' stated that the lack of existence or enforcement of regulations is the principal reason why so much of the world's shipping tonnage is registered in FOC countries. Vessels listed as none are vessels that did not meet the standards of any of the classification societies for marine insurance purposes, and may be operating without any insurance.

Manders also stated that many of the ships listed contained asbestos insulation or other types of asbestos used in construction of the ship. Asbestos was not required to be encapsulated on older vessels. Old asbestos would dry out and break up into lumps, giving off asbestos dust. (CX-28, 29).

IV. DISCUSSION

A. Contentions of the Parties

Claimant, through Counsel, asserted injurious exposure to asbestos while an employee of NCS on five separate occasions: (1) discharging and unloading asbestos rolls and coils from the La Paix on December 5, 1993; (2) removing equipment from the Anchor gear yard, which was enclosed with corrugated and friable asbestos siding; (3) boarding and working numerous old ships that allegedly contained friable asbestos in ship holds, crew quarters, and engine rooms; (4) visiting the NOS gear shop, where asbestos brake shoes were removed; (5) visiting the NOS offices and gear shop that had loose asbestos ceiling insulation and broken asbestos floor tiles. Consequently, Claimant seeks temporary total disability compensation from October 11, 1995, Claimant's last day of work for NOS, until his death, February 14, 1995, and appropriate death benefits under the Act. Claimant further contends that NOS, as the last responsible employer, is liable for the full amount of the award under the Act and not entitled to a credit for amounts already previously paid by Valor and Anchor pursuant to 8(i) settlements.

Employer, NOS, denied: (1) Claimant suffered from mesothelioma related to occupational asbestos exposure; (2) any asbestos exposure to Claimant; (3) if Claimant was exposed to asbestos while employed by NOS, it did not cause or contribute to Claimant's mesothelioma, rather exposure primarily occurred from 1953 until the 1970's, while working for other employers, as well from 1978 to 1993, while employed by Valor and Anchor; (4) if NOS is responsible to Claimant for injuriously exposing him to asbestos, it is entitled to a credit for the amounts already previously paid by Valor and Anchor pursuant to 8(i)

settlements for their roles in injuriously exposing Claimant to asbestos.

B. Credibility of Witnesses

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh. denied,* 391 U.S. 929 (1968); *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981).

It has been consistently held that the Act must be construed liberally in favor of the claimant. *Vans v. Eikel*, 346 U.S. 328, 333 (1953); *J.B. Vozzolo, Inc. v. Britton*. 377 F.2d 144 (D.C. Cir. 1967). The United States Supreme Court has determined, however, that the "true doubt" rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d), and that the proponent of a rule or position has the burden of proof. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 114 S. Ct. 2251 (1994), *aff'g* 990 F.2d 730 (3rd Cir. 1993).

In this case, I was impressed by the nonexpert testimony of Claimant, P. Ibos, Macke, and Flanagan, concerning Claimant's asbestos exposure during the unloading of the La Paix and the retrieval of equipment at the Anchor gear yard for NOS use. Their testimony was moreover supported by the expert testimony of industrial hygienist, Jurisich. Jurisich testified that the La Paix incident

created a high risk of asbestos exposure because the cargo was not polyed, or wrapped airtight.

On December 6, 1993, while working for NOS, Claimant supervised the unloading of the La Paix. (CX-6, pp. 74-77; CX-9). The La Paix carried both rolls and coils of asbestos. In fact, NOS's representative, Flanagan, confirmed the hazardous nature of the asbestos cargo aboard the La Paix and even refused to send NOS employees into the hold to unload the unsealed, loose asbestos, where it was originally stowed, and informed Wientjes, the ship's representative, of such prior to the La Paix's arrival.

Nonetheless, prior to arrival at the Nashville Wharf, the asbestos had been containerized and put on the ship's deck, which was discharged from the La Paix upon arrival in New Orleans. Upon notification of such discharging, Flanagan again contacted Wientjes instructing him that NOS would not open the container nor handle the cargo, and Wientjes was to remove the container from NOS's terminal. (CX-23, p. 58-60). Nonetheless, Flanagan was subsequently notified that Wientjes had stripped the container, while at the Nashville Wharf, and loaded the asbestos cargo into some other means of transportation, of which stripping activities were completed in the presence of NOS employees, including Claimant.

Claimant supervised the unloading of the asbestos and was in the back of the container while the asbestos, which remained unsealed and was very dusty, was removed or stripped by forklifts and deposited on the Nashville Wharf. In addition, Claimant boarded the La Paix and went into the hold where the asbestos had been stored, which was very dusty. (CX-6 pp. 59,78-80, 210-214).

Additionally, no protective gear was worn by any of the parties involved in said activities of unloading the La Paix.

I was also impressed by the uncontradicted and credible testimony of Claimant, P. Ibos, and Macke concerning asbestos exposure while retrieving stevedoring equipment from the Anchor gear yard located at 3038 Tchoupitoulas Street, which was enclosed with corrugated and friable asbestos siding. Claimant, Macke, and P. Ibos testified that Claimant went to the gear yard frequently while working for NOS to retrieve stevedoring equipment, which he would loan to NOS to unload ships. (Tr. 68-71). According to Claimant, the building was constructed of corrugated metal, fully insulated with asbestos. (CX-6, pp. 226-29). On these occasions, Claimant would have to spend significant periods of time to "root around" to physically remove the equipment from the enclosed yard area, which had damaged asbestos siding on the walls. (Tr. 68-71, 98-102). Pictures of the damaged asbestos siding appear in CX-26.

However, I was not impressed by Claimant's assertion that he was possibly exposed to asbestos on the 328 ships he worked for NOS, nor did he present evidence that friable asbestos was on said ships and that he sustained injury as a result. The only evidence of possible exposure to asbestos came from Manders' reports, which were based on mere conjecture. Although said ships were constructed at the time Manders indicates them to have been built, he gave no indication that he actually inspected these ships, but instead appears to have based his findings on a generalized history of ship construction. (CX-28, 29). Thus, Manders report is merely speculative as it does not give any direct proof that any of the ships actually had friable asbestos in their construction, and Claimant did not

indicate that he was actually exposed to asbestos on any of the ships. (CX-6).

Similarly, Claimant presented no confirming evidence to establish asbestos exposure visiting the NOS gear shop, where asbestos brake shoes were removed or visiting the NOS offices and gear shop that had loose asbestos ceiling insulation and broken asbestos floor tiles. Although the evidence did reveal the tile mastic holding down the floor tiles in NOS office to have contain [sic] asbestos, Jurisich did not believe Claimant's exposure to said floor tiles was injurious and no direct proof was presented to me that friable asbestos was actually present or that injurious exposure occurred. (CX-32, pp. 48-49).

Under these facts, it is evident that Claimant was exposed to asbestos, via the La Paix incident and retrieving equipment from the Anchor gear yard, during his employment with NOS.

C. Prima Facie Case, Causation, Nature and Extent of Disability

In order to be eligible for benefits under the Act, Claimant initially must meet her burden of establishing a prima facie case of compensable injury. She must demonstrate some type of physical or mental impairment and prove some circumstance or condition at work which could have caused this impairment. *Graham v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 336, 338 (1981); *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 616 (1982). While Section 20(a) of the Act, 33 U.S.C. § 920(a), creates a presumption that the harm suffered by a claimant is causally related to his employment, this presumption does not aid Claimant in

establishing her prima facie case. *Devine v. Atlantic Container Lines, G.I.E*, 23 BRBS 2380 (1990); *Cairns v. Matson Terminals*, 21 BRBS 2152 (1988). It does not apply to whether the injury or harm actually occurred. *Id.* The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *U.S. Industries/Fed. Sheet Metal v. Director*, OWCP, 455 U.S. 608 (1982), *rev'g Riley v. U.S. Industries/Fed. Sheet Metal*, 627 F.2d 285 (D.C. Cir. 1982). The Claimant's theory of how the injury occurred must go beyond "mere fancy." *Champion v. S&M Traylor Bros.*, 690 F.2d 285, 295 (D.C. Cir. 1982).

Here, the dispute centers on whether a condition (asbestos exposure) existed at work which could have caused injury to Claimant. I find that the record clearly established that Claimant was exposed to asbestos at NOS. It should be initially noted that the Board and courts have never required a claimant to introduce medical evidence establishing that the conditions to which he was exposed in fact caused his disability in order to establish his prima facie case, rather only that such conditions existed which *could* have caused or contributed to the impairment. *Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279, 284 (1990). Moreover, the Board has held that there is no *de minimus* standard for exposure to injurious stimuli, rather that exposure to even minimal amounts of asbestos is enough to establish a prima facie case of liability. *Pininich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989), *rev'd sub nom. Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 13 (9th Cir. 1990). The Fifth Circuit is in agreement with the Board's position as to the claimant's standard. *See Avondale Industries v. Director, OWCP*, 977 F.2d 186, 190 (5th Cir. 1992).

Once Claimant has invoked the presumption, the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. *Ranks v. Bath Iron Works Corp.*. 22 BRBS 301, 305 (1989); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Volpe v. Northeast Marine Terminals*, 671 F.2d 697 (2d Cir. 1982); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In the instant case, Claimant was diagnosed with malignant mesothelioma, an occupational disease directly related to asbestos exposure. As noted above, Claimant was exposed to friable asbestos during the unloading of the La Paix and the retrieval of equipment from the Anchor gear yard for NOS's use. Medical evidence presented by Drs. Caputto, Martin, Abraham, M.D. Anderson, and Touro demonstrated that Claimant suffered from malignant mesothelioma related to occupational asbestos exposure. Dr. Martin credibly testified that any exposure to friable asbestos causes injury to the immune system and body tissues on a cellular level, thus establishing a clear prima facie case. (CX-30, pp. 38-39).

NOS presented no evidence to rebut the testimony of Dr. Martin. The only evidence offered was to rebut the evidence that Claimant suffered from mesothelioma. NOS relied solely on Dr. Sandler's testimony that Claimant did not clearly suffer from mesothelioma, reasoning that

certain aspects of Claimant's disease looked like mesothelioma and others did not. I am not impressed by Dr. Sandler's opinion that Claimant did not have mesothelioma, because Dr. Sandler is not a pathologist and did not take into consideration the overwhelming evidence of the pathologists who provided credible testimony and medical evidence in this case.

Assuming that Claimant did have mesothelioma, Dr. Sandler testified that the December 1993 La Paix incident did not result in any exposure that was sufficient to cause adverse health effects, and if exposure had occurred, it was not of the correct thing to cause mesothelioma nor would it be able to create any sort of change, modification, acceleration, or aggravation of a cancer that was already present. (EX-1, pp. 31-35, 60-61). However, that is not the issue. The issue is whether exposure to asbestos caused injury to Claimant. (CX-30, pp. 38-39). Notably "the last exposure rule *does not require a showing of an actual medical causal relationship between Claimant 's exposure and his occupational disease.*" *Franklin v. Dillingham Ship Repair*, 18 BRBS 198 (1986) *(referencing Whitlock v. Lockheed Shipbuilding & Construction Co.*, 12 BRBS 91 (1980); *Proffitt v. E.J. Bartells Co.*, 10 BRBS 435 (1979) (emphasis added). Claimant clearly suffered from not only malignant mesothelioma related to occupational asbestos exposure but with asbestos exposure at NOS, that damaged his immune system and lung tissue on a cellular level which created a risk of malignancy, as well as the risk of inducing more symptoms because of the effect of dust in the lung function, with both risks being somewhat independent from the cancer (CX-20, p. 24; CX-32, pp. 36-38), [sic]

The case law is clear, injurious exposure alone renders NOS liable, regardless of whether that asbestos exposure was actually causative of Claimant's mesothelioma. NOS has introduced no evidence to prove the absence of or sever the connection between such harm and employment or working conditions, and thus has failed to rebut the presumption. Thus, Claimant has proven injurious asbestos exposure related to his NOS employment.

To establish a *prima facie* case of temporary total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. *See Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. *Independent Stevedore Co. v. Alerie*, 357 F.2d 812 (9th Cir. 1966).

Under the Act, because Claimant was forced to stop working due to his injurious asbestos exposure and malignant mesothelioma, he is eligible for compensation for temporary total disability from October 11, 1995: the date he was forced to quit work, until February 14, 1995, the date of his death. His compensation is based on his Average Weekly Wage as of October 11, 1995, which was stipulated to be $1,450.00, based on earnings of $85,000.00 in the previous year, with a corresponding compensation rate of $760.92.

D. Last Responsible Employer

In its final argument, NOS asserts that even if Claimant suffered from malignant mesothelioma, NOS is not liable to Claimant because NOS was not the employer under whom Claimant received his last injurious exposure, *i.e.*, his exposure occurred somewhere other than with NOS, relieving NOS of any liability under the Act. The well-established rule for establishing the responsible employer in occupational disease cases under the Act is known as the *Cardillo* rule. The *Cardillo* rule states:

> Congress intended that the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising out of his employment, should be liable for the full amount of the award.

Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 145 (2nd Cir.), *cert. denied,* 350 U.S. 913 (1955).

Once a claimant establishes injurious exposure with a covered employer, the burden falls on the employer to establish that it is not the responsible employer. *Avondale Industries*, 977 F.2d at 190-91; *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 157 (1996); *Maes v. Barrett & Hilp*. 27 BRBS 128, 131 (1993). This can be accomplished by showing with substantial evidence that the claimant/decedent was exposed to injurious stimuli while working with a subsequent covered employer. *Avondale Industries*, 977 F.2d at 190-91; *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149 (1989).

Here, NOS presented no credible evidence to support his contention and therefore fails to meet the burden

necessary to escape liability. Consequently, pursuant to established Board and the Fifth Circuit precedent, I find NOS to be liable for all compensation due Claimant.

E. Credit Doctrine

The credit doctrine was created by the Board as a limit on the aggravation rule and to prevent double recoveries. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 515 (5th Cir. 1986). Under the credit doctrine, "an employer is not liable for any portion of an employee's disability for which the employee has already been compensated under the LHWCA." *Id.* at 515.

Claimant points out that the Board in *Aples* indicated that Section 3(e) of the Act is applicable only to amounts previously received from other workers' compensation laws or the Jones Act, not from previous recoveries under the LHWCA. *ITO Corporation v. Director and Paul Aples*, 883 F.2d 422, 425 (1989). I agree, but find as argued by Employer, that the credit doctrine applies independently of Section 3(e) and is applicable here to prevent double recoveries where the worker has been previously compensated for the *same* disability. *Id.* at 427 (emphasis added).

Thus, I find that NOS is entitled to a credit for the $150,000 less expenses and attorney fees, for settlement proceeds previously paid to Claimant under the Act by Anchor and Valor for the same injury.

F. Benefits Due

Initially it must be noted that Section 33 U.S.C. § 908 disability benefits must be distinguished from Section 33 U.S.C. § 909 death benefits as two separate causes of

action, one for disability lying with the disabled employee, and one for death lying with the specified survivor of the decedent. *Henry v. George Hyman Construction Co.*, 749 F.2d 65, 73 (D.C. Cir. 1984).

Death Benefits

Section 9 of the Act provides in pertinent part:

> If the injury causes death, the compensation therefore shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> > (a) Reasonable funeral expenses not exceeding $3,000, (b) if there be a widow or widower and no child of the deceased to such widow or widower 50 per centum of the average weekly wages of the deceased, during widowhood. . . .
> >
> > (e) In computing death benefits, the average weekly wages of the deceased shall not be less than the national average weekly wage as prescribed in section 6(b), but
> >
> > > (1) the total weekly benefits shall not exceed the lesser of the average weekly wages of the deceased or the benefit which the deceased employee would have been eligible to receive under section 6(b)(1); and
> > >
> > > (2) in the case of a claim based on death due to an occupational disease for which the time of injury

> (as determined under section 10(i)) occurs after the employee has retired, the total weekly benefits shall not exceed one fifty-second part of the employee's average annual earnings during the 52-week period preceding retirement.

33 U.S.C. § 909.

A claim for death benefits under the Act is a separate and distinct right from a claim for disability, and such a right does not arise until the death occurs. *Puig v. Standard Dredging Corp.*, 599 F.2d 467, 469 (1st Cir. 1979). In such a claim, the time of injury cannot be prior to the employee's date of death. *Lynch v. Washington Metro. Area Transit Auth.*, 22 BRBS 351, 354 (1989). Consequently, Claimant is entitled to death benefits pursuant to Section 9 of the Act beginning February 15, 1996, and continuing.

V. INTEREST AND ATTORNEY FEES

Although not specifically authorized in the Act, the Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev 'd on other grounds, sub nom, Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board has concluded that the rate used should be "the rate employed by the United States district Courts under 28 U.S.C. § 1961 (1982). *Grant v. Portland Stevedoring Co. et al.*, 16 BRBS 267 (1984). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 28 of the Act and implementing Code of Federal Regulations Section 702.132 provides for approval of attorney's fees. Claimant's counsel is hereby allowed thirty (30) days from the date of service of this decision to supplement his present application and submit the application for attorney's fees. A service sheet showing that service has been made on all parties, including Employer, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law and the record in its entirety, I enter the following Order:

1. Employer shall pay to Claimant's widow, P. Ibos, temporary total disability compensation pursuant to the Act for the time frame encompassing October 11, 1995 to February 14, 1996, based on an Average Weekly Wage of $1,450.00, with a corresponding compensation rate of $760.92.

2. Employer shall pay to Claimant's widow, P. Ibos, death benefits pursuant to Section 9 of the Act from February 15, 1996, and continuing. Compensation shall be based on the parties' stipulated average weekly wage.

3. Employer shall be entitled to a credit in the amount of $150,000 less expenses and attorney fees, for settlement proceeds previously paid to Claimant under the Act by Anchor and Valor.

4. Employer shall pay interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent, as determined by the Secretary of the Treasury, of the average auction price for the last auction of 52 week United States Treasury bills as of the date this Decision and Order is filed with the District Director.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel, who shall have twenty (20) days to file any objection thereto.

ORDERED this 13th day of April 2000, at Metairie, Louisiana.

s/ _____
CLEMENT J. KENNINGTON
Administrative Law Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-60480

NEW ORLEANS STEVEDORES;
SIGNAL MUTUAL
ADMINISTRATION LTD

Petitioners Cross-
Respondents

v.

PEGGY IBOS, Surviving
spouse of Bertrand Ibos, Jr; -

Respondent-Cross-
Petitioner

DIRECTOR OFFICE OF
WORKER'S COMPENSATION
PROGRAMS, US DEPARTMENT
OF LABOR

Respondent

Filed Jun 10, 2003
Charles R. Fulbruge III
Clerk

Petitions for Review of an Order of the
Benefits Review Board

ON PETITION FOR REHEARING EN BANC

(Opinion 01/16/03, 5 Cir., ___, ___ F.3d ___)

Before KING, Chief Judge, and JONES and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

REHG-7a

EDITH H. JONES, Circuit Judge, dissents.